

Boldly Going Where No Law Has Gone before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance

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Abstract

This article focuses on the response of public law to bureaucratic disenfranchisement. Whether eligibility decisions for social welfare benefits are made on the basis of a face to face interview or telephone intake screening at a call centre, whether the questions are onerous for vulnerable applicants to answer, whether the bureaucratic hurdles can reasonably be surmounted or lead to the de facto exclusion of otherwise eligible applicants, all constitute questions which should be fundamentally intertwined with the question of whether a discretionary decision is legally valid. This is so not only because service delivery models and administrative design may determine the fairness, reasonableness, and accuracy of a decision, but also because forms of administration ought not to be inconsistent with our fundamental values, such as human dignity. This article advocates a more robust, public law response to the welfare system than courts have been willing to undertake. This approach requires that judges look beyond the veil of public administration and ensure that the rule of law reaches all spheres of public authority. Changing the welfare system, however, ultimately requires changing political and bureaucratic, as well as legal, culture.

Keywords

Public law; Public welfare administration

BOLDLY GOING WHERE NO LAW HAS GONE BEFORE: CALL CENTRES, INTAKE SCRIPTS, DATABASE FIELDS, AND DISCRETIONARY JUSTICE IN SOCIAL ASSISTANCE[©]

LORNE SOSSIN*

This article focuses on the response of public law to bureaucratic disenfranchisement. Whether eligibility decisions for social welfare benefits are made on the basis of a face to face interview or telephone intake screening at a call centre, whether the questions are onerous for vulnerable applicants to answer, whether the bureaucratic hurdles can reasonably be surmounted or lead to the de facto exclusion of otherwise eligible applicants, all constitute questions which should be fundamentally intertwined with the question of whether a discretionary decision is legally valid. This is so not only because service delivery models and administrative design may determine the fairness, reasonableness, and accuracy of a decision, but also because forms of administration ought not to be inconsistent with our fundamental values, such as human dignity. This article advocates a more robust, public law response to the welfare system than courts have been willing to undertake. This approach requires that judges look beyond the veil of public administration and ensure that the rule of law reaches all spheres of public authority. Changing the welfare system, however, ultimately requires changing political and bureaucratic, as well as legal, culture.

Cet article s'intéresse à la réaction du droit public face aux pertes de droits suite à une décision bureaucratique. Savoir si les décisions concernant l'admissibilité aux prestations de l'assistance sociale sont prises sur la base d'une entrevue effectuée face à face ou d'un entretien téléphonique préalable de prise en charge effectué dans un centre d'appel, si les questions posées aux demandeurs vulnérables sont laborieuses, si les embûches bureaucratiques peuvent raisonnablement être surmontées ou mènent à l'exclusion avérée de demandeurs autrement admissibles, toutes ces questions devraient fondamentalement s'entrecroiser avec celle de savoir si une décision discrétionnaire est valable du point de vue juridique. Il en est ainsi non seulement parce que les modèles de prestation de services et la structure administrative peuvent déterminer le bien-fondé, le caractère raisonnable et la justesse d'une décision, mais également parce que les formes d'administration ne devraient pas contredire nos valeurs fondamentales, telles que la dignité humaine.

Cet article préconise une réaction plus marquée du droit public envers le système de l'aide sociale que celle volontiers adoptée par les tribunaux. Cette démarche demande aux juges de soulever le voile de l'administration publique et de s'assurer que l'état de droit atteint toutes les sphères des pouvoirs publics. Mais pour changer le système de l'aide sociale, il faut somme toute changer la culture politique et la culture bureaucratique, tout autant que la culture juridique.

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I. INTRODUCTION

Social assistance is a matter of law. Benefit levels and eligibility criteria are set out in statutes and regulations and elaborated for decision-makers in administrative guidelines and manuals.¹ Social assistance is also a matter of discretion. Discretion is typically understood in the legal sense of statutory grants of authority in which the decision maker is provided with a choice as to the decision at hand. For example, many social assistance statutes authorize caseworkers to provide emergency assistance where circumstances warrant. Discretion is also sometimes understood in the interpretive sense. Social assistance statutes often provide for a series of benefits once a "disability" is established but the precise meaning of this term is left to be worked out through administrative interpretation and

¹ While social assistance eligibility criteria may be found in statutes, regulations, policy guidelines and manuals, these are not all treated similarly under Canadian public law. Statutes and regulations are considered "law" and therefore held to bind discretionary decision makers while guidelines are considered "policy" and therefore held to be non-binding. Elsewhere, this distinction has been argued to be both difficult to sustain and undesirable, particularly in the social welfare context. For discussion, see Laura Pottie & Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2003) [unpublished, on file with author].

judicial review. In this article, I focus on a third level of discretion, one concerned with administrative design. This level of discretion, I contend, is most often responsible for the phenomenon of bureaucratic disenfranchisement and is too often ignored in public law circles.

How one applies for benefits, how decisions on eligibility are reached, the training and qualifications of decision makers, the degree of personal contact with applicants, the nature and kind of documents which must be produced and verified, and so forth, each has a profound effect on applicants and recipients. But should government be legally accountable in some way for these choices? Must these administrative choices, as a matter of law, lead to fair, equitable, reasonable, and just administrative designs or may they be driven simply by cost savings, efficiency or political concerns? These are the questions I seek to address in this article.

The welfare system is often described as an “expert system.” Its design and operation are often opaque and confusing for applicants. It is also often said that in such settings, front-line decision makers *are* the policy makers.² Policy and administration are indistinguishable because these decision makers deal with a high volume of cases, with few opportunities for supervision, and must adapt general and abstract rules to the complex, personal circumstances of applicants. While the boundary between policy making and public administration is widely recognized as porous, the boundary between public law and public administration, as I elaborate below, has proven more resilient. Indeed, where public administration begins, it often appears that public law ends. In my view, a re-examination of the extent to which this distinction is tenable or desirable is long overdue.

Whether the eligibility decision is made on the basis of a face-to-face interview or telephone intake screening, whether the questions are onerous for vulnerable applicants to answer, whether the bureaucratic hurdles can reasonably be surmounted or lead to the de facto disenfranchisement of otherwise eligible applicants for social assistance, all constitute questions which are, in my view, fundamentally intertwined with the question of whether a discretionary decision is legally valid. This is so not only because forms of administration may determine the fairness, reasonableness, and accuracy of the decision, but also because forms of administration must live up to our fundamental values—what Jerry Mashaw

² The classic studies of this phenomenon are Michael Lipsky, *Street Level Bureaucracy: Dilemmas of The Individual in Public Services* (New York: Russell Sage Foundation, 1980) [Lipsky, *Street Level Bureaucracy*] and Jeffrey Manditch Prottas, *People Processing: The Street Level Bureaucrat in Public Bureaucracies* (Lexington: Lexington Books, 1979). For a Canadian perspective, see Greg McElligott, *Beyond Service: State Workers, Public Policy and the Prospects for Democratic Administration* (Toronto: University of Toronto Press, 2002).

terms the “dignitary appropriateness” of an administrative system.³ I argue that public law’s concern for accountability in how public authority is wielded should be extended to the administrative domains that have been the most impervious to legal scrutiny. Where discretionary authority is the broadest and the parties affected the most vulnerable, such as in social assistance settings, the importance of legal accountability—indeed, of any kind of accountability—is particularly acute.

I argue that the *form* of public administration shapes and constrains the scope of legal discretion just as often, and just as importantly, as do guidelines, regulations, or statutes that determine the substance of eligibility for benefits. As I elaborate below, I would question whether form and substance can be disentangled at all in the discretionary settings of social assistance. If you are concerned about evaluating whether a discretionary decision was fairly reached, whether it was reasonable and within the authority of the decision maker—if you are interested, in other words, in the traditional concerns of discretionary justice in administrative law—you must look just as carefully at the intake call centre scripts as the policy guidelines; similarly, the database software used by the intake officers is as relevant as the Regulations issued by Cabinet. For example, if intake for a disability benefit is taken only over the phone with inadequate accommodation for the fact that many applicants will lack the ability to complete an application over the phone, then the form of administration has determined the substance of the decision. The person left holding the phone with unintelligible questions or a busy signal on the other end will have been alienated from the decision-making process, and bureaucratically disentitled to benefits that she is legally due. As it stands now, though, there is practically no legal recourse available to this person (nor recourse of any other kind). This situation is, in my view, unacceptable.

Where service delivery models have as much influence on decision making as substantive eligibility criteria, duties of procedural fairness and reasonableness amount to half measures if applied to the latter but not to the former. This is not to suggest that cost considerations and managerial philosophies of particular governments are irrelevant or that judges should be invited to micromanage the operation of welfare offices. My view, simply, is that discretionary justice (understood at its simplest in the negative—as minimizing injustice from the exercise of discretionary

³ Jerry L. Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985) c. 6.

authority)⁴ requires that forms of public administration be subject to minimum standards of fairness and reasonableness.

This analysis of these arguments will be divided into three sections. In Part II, I describe the administrative setting of social assistance determinations, using the recent restructuring of social assistance delivery in Ontario as a case study. In Part III, I examine the extent to which, and the basis on which, the administrative system of service delivery ought to be subject to public law requirements of procedural fairness and reasonableness. Finally, in Part IV, I consider the recent trend toward privatization of welfare administration in the United States and the additional complexities of legal accountability that result. I conclude this section with a consideration of the principles on which a legal response to bureaucratic disentanglement should be founded, and how those principles might be put into practice.

I advocate a more robust, public law response to the welfare system than courts have been willing to undertake. This approach requires that judges look beyond the veil of public administration and ensure that the rule of law reaches all spheres of public authority. This is not intended, however, simply as a plea for expanding the judicial role or the role of litigation in securing welfare rights. Judicial recognition of the legal obligations owed by governments in the design of welfare systems can act as a catalyst for administrative reform, and may open other avenues for redress to those applicants and recipients who have been denied benefits to which they were due. Nevertheless, changing the welfare system ultimately requires changing political and bureaucratic as well as legal culture.

II. WELFARE'S SERVICE DELIVERY MODEL IN ONTARIO: DISENTITLEMENT BY BUREAUCRACY

The central proposition I wish to advance in this paper is that public law cannot and should not be divorced from the administrative mechanisms used to achieve policy ends. My analysis will focus on the Ontario experience and the shift in service delivery model undertaken as part of the provincial government's restructuring of welfare in the late 1990s. In 1997, Ontario enacted the *Ontario Works Act*⁵ and the *Ontario Disability Support*

⁴ See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969). Davis wrote, "Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness" (at 3).

⁵ S.O. 1997, c. 25, Sch. A [OWA].

*Program Act (ODSPA)*⁶ to replace earlier statutes providing general social assistance.⁷ Under the new scheme, individuals without a disability are required, in order to receive social assistance, to participate in workfare (which mostly consists of job training). Those individuals with a sufficiently substantial disability are not required to participate in workfare. While many aspects of the welfare system are discretionary, both in terms of eligibility and benefits,⁸ one of the most contentious areas of discretion lies in the determination of who has a disability and who does not.

The Ontario Government's restructuring sought not only to change the norms underlying social assistance from entitlement-based to contract-based, and to more starkly distinguish the deserving poor (ie. those unable to work in the market) from the undeserving poor (ie. those able to work in the market but unsuccessful in doing so), but also to reduce the Government's outlays on welfare more generally. That reducing expenditures on welfare is a policy priority of most governments in Canada is not a controversial observation. The reasons why many governments seek to reduce the number of welfare recipients and the level of their benefits are both obvious and subtle. The obvious benefits include reducing public expenditures in a time of fiscal restraint and, in some cases, obtaining political capital by getting "tough" on welfare. The more subtle benefits include support for low-wage industries by providing a ready source of inexpensive and available labour, winning the "race to the bottom" against other jurisdictions so as not to become a haven for social assistance recipient migrants, and reinforcing moral norms which value independence and self-sufficiency as the hallmarks of citizenship. This last motivation is, in turn, bound up with complex gender stereotypes that underpin the social

⁶ S.O. 1997, c. 25, Sch. B [ODSPA].

⁷ For a description of the new legislation and the scheme it replaced, see Ian Morrison, "Ontario Works: A Preliminary Assessment" (1998) 13 J. L. & Soc. Pol'y 1; and Harry Beatty, "Ontario Disability Support Plan: Policy and Implementation" (1999) 14 J. L. & Soc. Pol'y 1.

⁸ The question as to whether social assistance benefits are purely discretionary is not a simple one. Section 7 of the *OWA*, *supra* note 4, for example, states that "Income assistance *shall be provided* in accordance with the regulations to persons who satisfy all conditions of eligibility under this Act and the regulations" [emphasis added]. This suggests social assistance is a mandatory rather than discretionary benefit. However, the Regulations provide for a series of discretionary determinations which can result in ineligibility. To take just one example, s.11(1) provides that, "If the Director is not satisfied that a member of a benefit unit is making reasonable efforts to obtain compensation or realize a financial resource or income that the person may be entitled to or eligible for, the Director may determine that the person is not eligible for income support" (O. Reg. 222/98). The Act also requires as a condition of eligibility the production of specified documents (s.7(3)(c))—however, how a document is verified is left to the discretion of officials.

assistance system.⁹

One way to achieve these goals is simply to cut or eliminate social assistance benefits. Another way is to attach conditions to the receipt of assistance (for example workfare) or to restrict the categories of eligibilities. All of these policies are at least somewhat transparent and require some form of public justification (depending on whether they are initiated by statute, regulation, or guideline). Creating an onerous, even labyrinthine administrative process, in contrast, serves to advance these same purposes through bureaucratic disentanglement. When a government cuts benefits, it must do so transparently and must defend such choices to the electorate. When governments alter administrative designs, by contrast, this occurs largely without public input or scrutiny and with little or no recourse for those adversely affected by such changes. It is considered a matter of technological or bureaucratic restructuring, or in the inelegant words of the Ontario Government in the late 1990s, a "Business Transformation Project" (BTP).

For some time now, governments in the United States and Canada have waged an active campaign to move people from welfare to work, or more colourfully, "to end welfare as we know it." Reductions in eligibility coverage and benefit levels have been an important plank in this policy and often have been undertaken through policy initiatives. Restructuring "service delivery" permits numbers of recipients to be reduced since fewer will be capable of navigating their way through the application process, while those that do will have to fulfill precisely the kind of rigorous performance of contractual obligations which upholds market values. It also ensures that the receipt of social assistance is not a pleasant or affirming experience and reinforces the stigma associated with recipients' perceived failure in the market. When the Conservative Party won the 1995 election in Ontario, their first policy initiative was to reduce welfare benefits for most recipients by 21.6 per cent. Shortly thereafter, as indicated above, workfare was instituted in Ontario and able-bodied recipients were required to undertake job training, community service, or specified employment as

⁹ The relationship between social assistance and gender is rooted in the moral regulation of single mothers in particular. See, for example, Margaret Jane Hillyard Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998); Margaret Hillyard Little & Ian Morrison, "'The Pecker Detectors are Back': Regulation of the family form in Ontario welfare policy" (1999) 34:2 J. Canadian Studies 110; Janet Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Others" in Sheila M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice, and Everyday Life* (Toronto: Oxford University Press, 2000) 30; Patricia Evans, "Single Mothers and Ontario's Welfare Policy: Restructuring the Debate" in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace & Company, 1996) 151.

a condition of receipt of benefits.¹⁰ These policy shifts attracted widespread attention.¹¹ The litigation which followed this policy initiative confirmed that the courts were not prepared to reverse such express policy preferences, either under the *Charter*¹² or on administrative law doctrines such as legitimate expectations, the rule of law, or procedural fairness.¹³

By comparison to such policy initiatives, very little attention has been paid to the welfare *system*—to the process by which government determines eligibility for social benefits—which also underwent a sea-change at the same time.¹⁴ While there is much that is new about the changes to the welfare system discussed below, it is important to situate welfare administration against a broader backdrop. The administration of welfare has never been a value-free or neutral phenomenon. Like the policy differentiation of those who are indigent by reason of work-related injuries from those born disabled, and the differentiation of those who are indigent by reason of losing a job from those who never bothered to look for one, the welfare system also represents a moral and ideological order, separating and demarcating the “deserving” from the “undeserving” poor. Today’s system of poverty relief is not far removed from the poorhouses of England where, as Joel Handler writes, “administration was accomplished through the deliberate use of moral degradation.”¹⁵

The link between welfare administration and moral regulation has

¹⁰ See Morrison, *supra* note 7.

¹¹ See Maeve Quaid, *Workfare: Why Good Social Policy Ideas Go Bad* (Toronto: University of Toronto Press, 2002); Jamie Peck, *Workfare States* (New York: Guilford Press, 2001) c. 6.

¹² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

¹³ See *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.) (leave to appeal to the Ont. C.A. refused). For a general discussion of the limits of law in social policy settings, see David J. Mullan, “The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality” in Mary Jane Mossman & Ghislain Otis, eds., *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montréal: Les Éditions Thémis, 2000) 313.

¹⁴ This may be about to change as advocacy groups highlight the unfairness of the application process for social benefits. See John Fraser, Cynthia Wilkey & JoAnne Frenchkowski, “Denial by Design ... the Ontario Disability Support Program” (Toronto: Income Security Advocacy Centre, 2003), online: <http://www.incomesecurity.org/index_1.html>; Dean Herd & Andrew Mitchell, “Discouraged, Diverted and Disentitled: Ontario Works New Service Delivery Model” (Toronto: Community and Social Planning Council of Toronto, 2002) at 7, online: <<http://www.socialplanningtoronto.org/CSPC-T%20Reports/Discouraged.pdf>>.

¹⁵ Joel F. Handler, “‘Constructing the Political Spectacle’: Interpretation of Entitlements, Legalization and Obligations in Social Welfare History” (1990) 56 *Brook. L. Rev.* 899. See also Frances Fox Piven & Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Pantheon Books, 1971).

become more subtle but remains an animating principle of administrative reform in the sphere of social assistance. This may be illustrated by returning to the example of the BTP. In February 1997, the Ontario Ministry of Community and Social Services entered into a contract with Andersen Consulting (now Accenture) to design and implement this project. The project included design of a new computer system; this new technology, which linked all the welfare delivery sites in the province, was intended to decrease error and fraud. The project resulted in the introduction of new management practices and a new Service Delivery Model (SDM) for social assistance, which became operational in January 2000.

The point of the new SDM was to modernize the delivery of social assistance benefits and to save money. The SDM could save money in two ways—reducing the personnel costs associated with welfare through increased reliance on technology, or reducing the costs associated with welfare by reducing the welfare rolls (ostensibly by eliminating error and fraud).¹⁶ Underlying the logic of saving money through changing the system by which welfare is administered in order to reduce the number of people on welfare is also the logic of bureaucratic disentanglement.

Matthew Diller explains the process of bureaucratic disentanglement in accomplishing welfare reductions in the following terms:

Policymakers, however, can accomplish the same end without changing a single eligibility condition or requirement by making administrative adjustments which have the same effect. For example, they could simply open the welfare centers an hour later each morning and close them an hour earlier. They could relocate centers from poor neighbourhoods to central downtown locations. They could multiply the number of appointments necessary to establish eligibility. Carrying this logic further, officials could increase the amount of time applicants must wait for appointments, remove some of the chairs from the waiting room, add pages to the application form, reduce the number and variety of foreign language interpreters, and so forth.¹⁷

¹⁶ Sanford Borins, in his appraisal of the Business Transformation Project, observed: "In February 1999, Hession [the project manager] and HLB [a risk analyst firm hired to appraise the Business Transformation Project] reported, based on their statistical analysis of the program, that BTP would likely yield \$347 million in benefits, a return of 222 per cent on the original investment. The benefits would arise from productivity gains in the administration of OWP and ODSP as well as more accuracy in making payments to recipients." See "New Information Technology and the Public Sector in Ontario" (Research Paper Series No. 12, Report to the Panel on the Role of Government, June 2003) at 45, online: Bora Laskin Law Library <<http://www.law-lib.utoronto.ca/investing/reports/rp12.pdf>>. The Accenture contract sparked a new controversy in the summer of 2004 when it was announced that the computer system could not process a 3 per cent rise in benefit rates without a substantial delay. See Richard Brennan & Robert Benzie, "670,000 welfare, disability recipients can't get 3% hike" *Toronto Star* (6 July 2004) A1.

¹⁷ Mathew Diller, "The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government" (2000) 75 N.Y.U.L. Rev. 1121 at 1131.

Sheri Danz describes bureaucratic disenfranchisement as "effectuated through such practices as withholding information, providing misinformation, isolating applicants and requiring extraordinary amounts of documentation," every one of which "prevents the transformation of statutory rights into tangible benefits."¹⁸ Bureaucratic disenfranchisement may reflect a deliberate political or institutional policy or it may simply be the result of too few resources, too little training, or too little attention. Most often, it involves a little of all of the above.

Disenfranchisement is not always a clear-cut experience of losing or failing to obtain benefits. It is often the accumulation of subtle, difficult to pinpoint "discouragement practices."¹⁹ For one applicant, it might be the physical location of a welfare office, for another it might be the inability of welfare officials to cope with demand, leading to long lines, frayed nerves and exhausted staff and applicants, while for still another any one of these could be overcome but together they represent a simply insurmountable barrier. As Mashaw observes,

Kafkaesque procedures take away the participants' ability to engage in rational planning about their situation, to make informed choices among options. The process implicitly defines the participants as objects, subject to infinite manipulation by the system.²⁰

A number of bureaucratic disenfranchisement strategies have been associated with the BTP and the new SDM implemented in Ontario since 1997. These include: centralized "one size fits all" administrative process that is complex and inflexible; failing to assist applicants with the process; staff relations characterized by poor training and high turnover; and creating new steps and steps within steps that claimants must surmount

¹⁸ Sheri M. Danz, "A Nonpublic Forum or a Brutal Bureaucracy? Advocacy Claims of Access to Welfare Centre Waiting Rooms" (2000) 75 N.Y.U. L. Rev. 1004 at 1006 [footnote omitted]. See also Anna Lou Dehavenon, "Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs" (1989-90) 17 N.Y.U. Rev. L. & Soc. Change 231 at 233 (describing an "enormous and byzantine" bureaucracy and a "mind-boggling" array of rules) [footnotes omitted]. The term "bureaucratic disenfranchisement" was popularized in Michael Lipsky, "Bureaucratic Disenfranchisement in Social Welfare Programs" (1984) 58 Soc. Serv. Rev. 3.

¹⁹ This term is borrowed from Susan D. Bennett, "No relief but upon the terms of coming into the house"—Controlled Spaces, Invisible Disenfranchisements, and Homelessness in an Urban Shelter System" (1995) 104 Yale L.J. 2157 at 2164.

²⁰ Mashaw, *supra* note 3 at 175-76. Mashaw also observed that Kafka gained many of his impressions of administrative processes as a bureaucrat in an agency dispensing disability benefits. See *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983) at 91, n. 9.

before becoming eligible for benefits.²¹ The new SDM confronts claimants with a daunting and onerous two-stage application process (which involves a first stage telephone intake screening, a second stage face-to-face follow-up interview, each with significant information and documentation requirements), an ineffectual but time-consuming internal reconsideration process, and further delay, cost, and procedural uncertainty if a denial is appealed to the Social Benefits Tribunal. I will discuss each of these stages of the administrative process, highlighting the important structuring of discretion that is accomplished by administrative mechanisms and practices and which, as discussed below, is usually seen as beyond the scope of legal accountability.

A. *Intake Screening*

Ontario's new SDM added a preliminary screening stage to the welfare process prior to the interview with an intake official to decide the question of eligibility for benefits, whether under Ontario Works (OW) or Ontario Disability Support Program (ODSP). This preliminary screening process involves intake officials operating out of call centres fielding initial inquiries from welfare applicants.²² This intake process determines whether the applicants can move on to the second stage in-person interview to determine welfare eligibility.²³ There are several dynamics of the screening process that create barriers or obstacles to claimants and therefore contribute to the ethos of disentanglement: (1) the call centre; (2) the interactive voice response; (3) the scripts; (4) the screening; and (5) the discretion.

1. The Call Centre

Most of what I characterize as bureaucratic disentanglement occurs at the first stage of the application process and results in applicants who might otherwise have met the eligibility criteria simply giving up and withdrawing. In order to obtain welfare benefits in Ontario, applicants must begin by phoning an intake official located at a call centre (the closest call

²¹ See Herd & Mitchell, *supra* note 14 at 26-34. These strategies are not new—see the similar catalogue of disentanglement strategies discussed in Lipsky, *Street Level Bureaucracy*, *supra* note 2 at 8-31.

²² Seven regional call centres have been established as Intake Screening Units (ISUs) for the entire province.

²³ Intake officials can reject applicants if they have income or assets in excess of legislated limits, live with their parents or are not financially independent, have a past record of Ontario Works fraud, are incarcerated, are in receipt of a student loan or reside outside of Ontario.

centre is determined by reference to the applicant's postal code). The requirement to begin the application process in this fashion gives rise to a number of discouragement practices.

First, a telephone application removes the face-to-face interaction and renders the client nothing more than an anonymous voice on an earpiece. It is much easier for the intake screener to simply follow the script and move on to the next call. This can only be exacerbated with the length of time an intake screener spends in the call centre environment. It is likely much easier for intake officials to reject applicants or impose additional documentary requirements over the telephone than it would be if those same applicants were standing in front of them. This depersonalization of applicants combined with screener apathy clearly facilitates restrictive discretion.

Second, call centre work environments are generally quantity-rather than quality-oriented. In other words, call center operators are usually given time-per-call targets and number-of-call quotas. These numbers are usually monitored on an employee-by-employee basis, and employees know that they are being assessed against these criteria. In this environment, intake screeners would not feel free to extend time with any one applicant, and applicants would be less likely to obtain assistance appropriate to their particular situation.

Third, calls are usually recorded, either randomly or entirely. While this can work to protect an applicant by discouraging the provision of inappropriate information (however that is defined by management), it can also work against them. An applicant whose call is being recorded will feel less comfortable in speaking "off the record" to receive confidential information or advice from someone who works in the system. The intake screener will be similarly reluctant; where the intake screener is on the one hand aware that their calls are being monitored, and on the other hand aware of the political and administrative climate (not to mention the stated objective²⁴) of limiting the number of applications that proceed to an Internal Review, there will be an obvious aversion to helping applicants "too much." In other words, the intake screener will be less likely to "encourage" an applicant to file an objection to the screener's conclusion, for instance, or to provide moral support to an applicant.

The effect of dehumanizing applicants and exerting employment stresses to limit intake screeners' incentives to exercise expansive discretion

²⁴ The official job requirement for the Intake Screener states: "Clearly communicates with applicant any reason for ineligibility with enough detail to minimize the likelihood of an Internal Review." Taken from: Algoma District Services Administration Board, "Intake Screener (Equivalent to Case Manager —Reports to ISU Supervisor)," package 1, p. 1 [on file with author].

is significant. Herd and Mitchell make this point when they state that

the process of applying has been made much more complicated, and contains process pitfalls that can improperly render a person ineligible. The extent to which it does so depends on the interests and efforts of delivery agents to counteract the built-in biases toward diverting people which were the province's intention.²⁵

Minimizing the likelihood that intake screeners will be interested in using the tools available to them to "work the system" in a client's favour is a crucial element in actualizing an agenda to reduce the number of social assistance clients.

The effect of the use of call centres (whether or not it is the intent) is to create obstacles, barriers, and disincentives for potential applicants.²⁶ Even accessing the call centres requires overcoming challenges. Herd and Mitchell report that participants in their study of the intake process had problems getting through to the call centres. Some participants had to call 10-15 times before getting through, while others had to call back repeatedly to have straightforward questions answered.²⁷

2. Interactive Voice Response

The inability to contact workers or to get a satisfactory response to requests for assistance when attempting to leave messages for intake officials on the "Interactive Voice Response" system is a frustration for many but may create personal crises for others.²⁸ Interactive Voice Response involves calling into a number and being routed by a computerized voice to a series of pre-recorded messages. The system, which requires individuals to "press 1, 2 or 3" depending on their inquiry, is not suitable for situations that cannot be reduced to a standard enquiry. Recipients cannot ask the automated system a question or talk to a caseworker.²⁹ According to Herd and Mitchell, this automated system, which is allegedly more efficient than even "live" telephone conversations, is also part of "a larger process of de-personalizing social assistance:

²⁵ Herd & Mitchell, *supra* note 14 at 15.

²⁶ It should be emphasized that the use of call centres is not inherently alienating. For a study of how to integrate call centres in meeting client needs in social benefits settings, see U.K., House of Commons Committee of Public Accounts, *Better public service through call centres* (Twentieth Report of Session 2002-03, HC 373) (London: The Stationery Office, 2003) at 9-13, online: <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmpubacc/373/373.pdf>>.

²⁷ Herd & Mitchell, *supra* note 14 at 23.

²⁸ *Ibid.* at 27-29.

²⁹ *Ibid.* at 51.

distancing recipients from access to support and in the process isolating and marginalising them more.”³⁰ Certainly, one of the implications of the interactive voice response is to exacerbate linguistic, technological, and cultural barriers that vulnerable people may face in seeking to access the welfare system.

3. The Scripts

When an applicant does reach an intake official at the call centre, the official must read a series of questions from a “script,”³¹ and record the answers in database fields. The scripts effectively simplify the complicated reality of each claimant’s situation into a series of “inputs” into the system. A legal clinic caseworker was told by the call centre that the telephone screening process could not be bypassed, even for a schizophrenic claimant with a comprehension problem. Further, the call centre was not able to handle an “I don’t know” response to any of the questions posed. The same legal clinic caseworker was told that it was not acceptable to provide the information requested at the face-to-face eligibility meeting; the application could not proceed unless the screener was given a number to enter into the system.

4. The Screening

According to the “Denial by Design” report prepared by the Income Security Advocacy Centre on the application process for ODSP benefits, the Intake Screening Unit (ISU) telephone interview generally takes between forty minutes and an hour to complete.³² The authors note that access to telephones is a barrier in itself for some groups such as the homeless (and a significant number of low income people who, even if housed, lack telephones), while for others, especially those with cognitive impairments, the risk of misunderstanding the meaning or significance of questions is high and many individuals simply lack the capacity to complete

³⁰ *Ibid.* at 52.

³¹ Scripts serve multiple functions which clearly restrict expansive discretion. By demanding a certain level of information, they limit the intake screener’s ability to waive information requirements where it would be inappropriate, and expand the means by which an applicant may be turned away without receiving assistance. Conversely, by limiting the amount of information that an intake screener may ask of an applicant, scripts restrict an intake screener’s ability to gather information that may fall outside the script but is nevertheless relevant to the application. By limiting the information an intake screener may provide to an applicant, scripts also restrict the intake screener’s ability to communicate.

³² Fraser, Wiley & Frenckhowski, *supra* note 14 at 7.

the process. While ISU officials may refer applicants to in-person interviews, the applicants must still manage to interact on the phone to initiate the process by which these referrals are made. As one claimant stated:

If you have any kind of special needs, or your situation isn't exactly cut and dry, like black and white, you are automatically told you are not eligible. ... A lot of people don't have ... the confidence to call the office directly and make the complaint. They just kinda give up.³³

A caseworker participating in the Herd and Mitchell study reported:

[My client] would have given up many times during the process if she had called the centre on her own. ... I also feel that the call centre would have told her she wasn't eligible because she did not have the information needed to apply. On top of this they would have given her wrong advice ...³⁴

The Denial by Design report also found that the skills, background and judgment of particular ISU officials varied widely. An internal government study disclosed that some officials have made findings of "ineligibility" but recorded "applicant chose to discontinue" in the official file, thereby extinguishing appeal rights. The training given to ISU officials varies but often is minimal. One official indicated that it is not uncommon in Toronto for administrative assistants to moonlight as part-time intake officials with no social work or caseworker training.³⁵

Even a "conclusion" of ineligibility is not a final determination in the new process, but can lead applicants to believe mistakenly that a decision has been made. The process of lodging an "objection" to the "finding of ineligibility" is complicated and must be followed precisely, otherwise it will become a "decision" that cannot be appealed. An example of confusing language in a sample letter: "A conclusion cannot be appealed. However if you disagree with this conclusion of ineligibility, you may submit a formal objection."³⁶ Another example of confusing language occurs in the letter an applicant receives if their objection is unsuccessful: "If you disagree with the results of the internal review, you may appeal the decision to the Social Benefits Tribunal within thirty days of the date when the

³³ Herd & Mitchell, *supra* note 14 at 24.

³⁴ *Ibid.* at 25.

³⁵ Interview of former Toronto-area welfare caseworker (March 2003).

³⁶ Taken from North Intake Screening Unit, Nipissing District Social Services Administration Board, Algoma District Services Administration Board, Example conclusion of ineligibility letter, dated January 12 2001, package 12 at 1 [on file with author].

internal review should have been completed.”³⁷

Despite this highly confusing screening process, a review of the new intake screening units in 2001 indicated that provincial efficiency targets were not being realized. A lower-than-anticipated percentage of applicants was being found ineligible at the initial, telephone-intake stage. One of the suggested strategies for increasing efficiency included instructing screeners to make conclusions of ineligibility “for as many applicants as possible” and to exercise greater discretion in finding people ineligible whose income and assets fall within 15 per cent of the allowable limit.³⁸ In other words, one of the most effective disentitlement mechanisms is to withhold the benefit of the doubt from applicants.

The point of the ISU stage of the application process is not merely to reduce the number of welfare recipients; arguably, it is also intended to limit and structure the discretion officials wield over the intake process. This is done by subtle means—the intake scripts, the mandatory database fields, et cetera—as well as by more direct measures such as the ineligibility within the 15 per cent guideline mentioned above. Whatever the form, all have the effect of limiting the ambit of the intake official’s judgments in relation to eligibility. Gradually, a discretionary power to determine eligibility becomes reduced to a series of isolated and fragmented pieces of an equation that intake screeners with little training and few qualifications are expected simply to calculate. The most significant discretion that is left to these screeners is the authority to defer an application to an in-person interview when the circumstances of an application make it inappropriate to screen through a telephone call.

5. The Discretionary Use of In-Person Interviews

The exercise of this discretion is not a straightforward process. In order to coordinate the activities of the ISUs and the local offices, a vast array of protocols and policies have been established. These protocols limit expansive discretionary decision making in a number of ways, not the least of which is by creating a separation between the workers who agree to certain procedures, and the workers who perform them. For instance, a local office can and does conduct “off-site verification interviews” for those who are unable to attend an interview at a local office (typically, this might occur where an applicant is in hospital). It is the intake screener, however,

³⁷ Taken from “Letter: Outcome of Internal Review—Appealable Letter; Letter #4 (user),” package 1 at 3 [on file with author].

³⁸ *Ibid.* at 19-20.

not the local office, that schedules interviews, and thus a protocol sets precise criteria for when a client will be granted an off-site interview.³⁹ This necessarily precludes a discretionary decision to expand these circumstances where appropriate. Where local offices or individual workers schedule their own interviews, they may be able to take advantage of their own circumstances (for instance a last-minute cancellation, or some other scheduling opportunity) to provide an off-site interview to a client who perhaps does not meet the precise policy criteria for an off-site interview, but needs it nevertheless. This possibility becomes important given the restrictiveness of the protocol criteria. There are surely clients and applicants who would find it a serious hardship to make it to the local office, and yet would not meet the protocol for scheduling an off-site interview. The most obvious situation where this might occur is in a location where public transportation is not available. Lack of public transportation, or an inability to afford the public transportation that is available, are not among the criteria for scheduling an off-site interview.⁴⁰ Since the agency staff conducting the interview are not the ones scheduling it, they cannot make exceptions to the policy based on either the client's circumstance or their own.

Another example occurs when a local office is experiencing a period of particularly high demand. Local offices communicate their availability to the ISU using a software program. The software lists a series of available appointment times, and the intake screener may not schedule appointments outside of those times. Where the wait for an appointment is greater than five days, according to the protocol the intake screener must schedule the appointment, and then contact the local office and advise them that appointments are being booked more than five days in advance.⁴¹ Whereas a local office or a caseworker might be able to schedule an after-hours appointment for a client who is in crisis, or for whom a wait of five or more days would be inappropriate, the ISU does not have the ability to do this. Similarly, if a local office had a last minute cancellation, it might be able to fill that available time with a client who had asked to have an earlier appointment if possible. An ISU would not be able to do this, for two reasons. First, the ISU would likely not even be aware of the last minute cancellation. Second, ISUs are not permitted, as part of the protocol, to

³⁹ Business Transformation Project, Joint Protocol Working Session, "Protocol—Booking of Home/Off-Site Visits by the ISU," (Revised 22 February 2001), package 2 at 14 [on file with author].

⁴⁰ *Ibid.* at 14.

⁴¹ *Ibid.* at 17.

schedule appointments less than 48 hours in advance.⁴²

Centralization limits the ability of the regions to design service delivery appropriately for its specific circumstances and demographics. A clear example of the limitations posed by centralization was identified by a social service delivery taskforce, in its report to Windsor's City Council. According to a South West Region ISU service delivery protocol, intake screeners have the discretion to refer an applicant directly to the local office, bypassing the telephone screening process, in a discrete set of circumstances where a telephone application would be inappropriate. The criteria for a bypass of the telephone application seem inclusive enough, and include literacy, language, and disability barriers.⁴³ However, the central goal is to conduct 90 per cent of intake interviews using the telephone screening process. In Windsor, 10 per cent of the population at large is disabled, 21 per cent are seniors, and there are a large number of refugees and immigrants who may not speak English. All of these represent categories of residents who would be at risk of poverty, and also represent categories of persons for whom the telephone screening process might be inappropriate according to the joint protocol's own criteria; it is likely that much more than 10 per cent of applicants from the Windsor area *should* be diverted to the in-person interview. Yet the centralized targets restrict the intake screener from exercising this discretion in as many cases as would likely be appropriate for the Windsor region.⁴⁴

This example demonstrates that modeling service delivery on a large scale limits the agency's ability to exercise discretion, by setting goals that may not be appropriate for all regions. As Herd and Mitchell conclude, "it is hard to explain the new application procedure as anything other than a structured attempt to reduce the number who can successfully negotiate the application process."⁴⁵

B. *In-Person Interview and the Determination of Eligibility*

For those who pass through the intake telephone screening, the second stage of the application process, as indicated above, is an in-depth, person-to-person interview. The interview may also be the first stage where intake screening by telephone is deemed inappropriate. Just as the geographic remoteness of the intake screening call centres may have an

⁴² *Ibid.* at 13.

⁴³ *Ibid.* at 9.

⁴⁴ "Taskforce Report to City Council," unnamed, undated, at 1, 4 [on file with author].

⁴⁵ *Supra* note 14 at 25.

alienating and disorienting effect on applicants, so may the physical design of interview centres. As Austin Sarat observes, for welfare applicants waiting represents “the physical embodiment of their own weakness” and the experience “of having someone else’s place triumph over their time.”⁴⁶ The disempowering implications for welfare applicants are exacerbated by the physical space in which waiting often occurs. One law student described the ODSP application centre in downtown Toronto in the following terms:

On the second floor, and accessible by an elevator, the waiting area consists of one room, approximately twenty feet by twenty-five feet. There are two rows of thick plastic chairs, with the rows facing each other, and approximately six feet between the rows. The chairs are bolted to the floor. There are approximately 16 chairs in total, although some have signs taped to them indicating that that chair is broken, and should not be used.

At the far end of the room the reception counter consists of a work area protected entirely by thick plexi-glass. Clients may pass documents through a small hole in the lower part of the shield. There is no speaking hole in the plexi-glass.

Numbered “meeting rooms”, approximately 12 of them, line two other walls of the room. These rooms contain nothing more than a desk and one or two green plastic lawn chairs. Each room is accessible from the waiting room, and also has a “back door” to the secure staff area. Many of the rooms have a plexi-glass window separating the client and the caseworker, such as one might see in a high security prison visiting area. Again, there are no holes in the plexi-glass to facilitate communication, although there is a small hole through which documents may be passed. Each of the meeting rooms has a window on the door leading to the waiting room.

Aside from the chairs, and one Government of Canada Job Bank Machine, the waiting room is completely bare. There are no posters, no information pamphlets, no radio, no magazines to read while waiting for a worker, nothing. There is no carpeting, no windows to the outside. There is a shelving unit, which appears to have been used at one time for pamphlets, but it is completely empty. The walls and floor are painted “institution” pink and green. The atmosphere is cold, untrusting, and uninviting, and needs to be seen to be appreciated.⁴⁷

⁴⁶ Austin Sarat, “... The Law is All Over’: Power, Resistance and the Legal Consciousness of the Welfare Poor” (1990) 2 *Yale J. L. & Human.* 343 at 343.

⁴⁷ Laura Pottic, “Memorandum on ODSP Centre at 385 Yonge St.” (20 February 2003) [unpublished, on file with author]. This echoes the stark ethos of despair which characterizes many welfare offices in the United States. One such office was described in the following terms: “The waiting area is a stark, oppressively stuffy room with dim lights and pale walls. A yellowed map of the United States hangs conspicuously in one corner, while the remaining walls are bare, except for the black and white flyers dotting them, commanding “NO EATING IN THIS WAITING AREA.” The gray floor is strewn with broken crayons, pencils, and scraps of papers filled with children’s scrawl, perhaps representative of their own innocent frustration in the waiting. There is no clock on the wall – a fitting omission in a room where time stands still. ... By 2:00pm children who have been at OESS since 8:00am are either crying from hunger or falling asleep. Women cannot feed their children in the building, nor can they leave to get food for fear they will be called for their intake interview and miss it. One woman fed her children sandwiches in the bathroom so they would not starve while waiting to be called.” This description is quoted in Bennet, *supra* note 19 at 2157-58.

The interview itself presents different hazards. This stage includes an "employment information session," the completion of a "participation agreement," the completion of an application form, verification of the information received and requests for additional information if any is missing or cannot be verified. For those claiming ODSP benefits, the intake interview is accompanied by the requirement that a "Disability Determination Package" (DDP) must be completed, which requires assistance from medical professionals (many of whom charge a user fee for these services).⁴⁸ Applicants receive no support in completing this paperwork. As the Denial by Design report observes, "Ironically, the complexity of the package, the lack of any resources to provide support to applicants or even to reasonably accommodate the very disabilities that underlies the program, make the program the least accessible to those who are most vulnerable."⁴⁹ Additionally, the Disability Adjudication Unit (DAU) decision-making process relies almost exclusively on the paper record in the DDP. Feedback on missing or inadequate documentation is often not forthcoming, and supplemental reports from specialists are often required even where primary care physician reports are available. The result is more cost, complexity and delay. The time lag between an application and receipt of benefits can be as long as nine months.⁵⁰

While the absence of support from welfare officials can be a matter of personal inclination, it is also a matter of the structures and controls which limit and direct the officials' discretion in their relationship with recipients. As researchers in the United Kingdom found when interviewing applicants for public housing assistance, there is a widespread perception that officials are "dead insensitive," that "there's no understanding of the people that they're dealing with, they just understand statistics of law, things like that," and that "you're just a statistic, you're not a human being."⁵¹

The relationship between officials and applicants is particularly important at the interview stage of the application process. The DAU, for

⁴⁸ Fraser, Wiley & Frencshkowski, *supra* note 14 at 11. The DDP consists of a Health Status Report, the Activities of Daily Living form, the Self Report, and the Consent to Release of Medical Information (*ibid.*).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at 22.

⁵¹ David Cowan & Simon Halliday, *The Appeal of Internal Review* (London: Hart, 2003) at 125. The interviewers concluded that applicants approached decision-makers from a position of relative powerlessness, and that applicants place their trust in the humanity of officials, the ability of officials to see and respond to their need. They add that "[t]he importance of being treated with respect and dignity was a theme which emerged clearly from our data."

example, has the authority and mandate to interpret the definition of disability (that is, whether the applicant is “substantially impaired”) and to evaluate the evidence submitted in support of an applicant’s file. The DAU has been criticized⁵² for requiring additional evidence of applicants that proved unnecessary,⁵³ for failing to request medical information when clearly required,⁵⁴ for failing or refusing to review new evidence,⁵⁵ for refusing to consider medical conditions not referred to in DDP forms,⁵⁶ discounting undiagnosed or unexplained conditions,⁵⁷ ignoring or unduly relying on its own policy manual,⁵⁸ and finally, mis-characterizing or “cherry-picking” medical evidence to support a conclusion.⁵⁹ Notwithstanding the criticisms leveled against the DAU, it is important to stress that discretion may just as easily be deployed in an applicant’s favour. One former welfare official with whom I spoke indicated that in a downtown Toronto welfare office, younger officials tended to be more sympathetic than older ones, and gave applicants “the benefit of the doubt.” My concern is not simply that the form of administration used in welfare settings allows for bureaucratic disenfranchisement of applicants, but rather that administrative design is integral to the exercise of discretion and therefore

⁵² These criticisms have been gleaned from a review of Social Benefit Tribunal decision dealing with DAU decisions. I should add that these SBT decisions are not easily obtainable by the public. There is a fee to have a decision made available and they are not catalogued according to subject matter or issues raised in the case. I am grateful to the Clinic Resources Office of Legal Aid Ontario for making available copies of some of the decisions they had collected.

⁵³ See e.g. SBT 0101-00168 (24 August 2001) (DAU asked for all clinical notes and consultation reports from family doctor even though initial report was detailed and specific) [on file with author].

⁵⁴ See e.g. SBT 9911-07810 (13 April 2000) (applicant reported seeing the same psychiatrist for 17 years in her Self Report form but DAU had not approached him for information) [on file with author].

⁵⁵ See e.g. SBT 0001-00570 (9 August 2000) (DAU requested additional information but refused to review it when it was submitted as it came in 19 days prior to the hearing rather than the 20 days set out in the rules [on file with author].

⁵⁶ See e.g. SBT 0004-03736 (24 January 2001) (DAU refused to consider applicant’s mental illness because it had not been listed on original application documents) [on file with author].

⁵⁷ See e.g. SBT 9906-03972 (19 November 1999), (DAU characterized applicant’s impairments as mild because investigations had revealed “no explanation” for applicant’s conditions) [on file with author].

⁵⁸ See e.g. SBT 9903-01606 (August 13, 1999) (DAU relied too heavily on its manual in assessing evidence of asthma) and SBT 0010-09741 (5 July 2001) (DAU not adhering to its own manual in its assessment of applicant’s fibromyalgia) [on file with author].

⁵⁹ See e.g. SBT 9911-08606 (5 July 2000) (Applicant’s doctor indicated “I do not have any other therapies to offer him but hopefully in the next year or so, there will be alternative treatments available”; DAU quoted only “in the next year or so there will be alternative treatments available”) [on file with author].

forms of legal accountability should extend to it.

C. *Consolidated Verification Process*

One familiar type of bureaucratic disentanglement is associated with "verification extremism."⁶⁰ One of the centerpieces of the new SDM is the Consolidated Verification Process (CVP) which occurs after a person begins receiving social assistance benefits. The Province reported that of the first 283,000 cases that were reviewed, 9 per cent had their benefits cut and 16 per cent of cases either withdrew or had their benefits terminated. According to Herd and Mitchell, there is also considerable evidence that "the application of CVP has resulted in numerous cases being closed improperly and unfairly."⁶¹

Individuals in complex or challenging circumstances may be unable to meet the onerous requirements of continuously proving their eligibility, which include providing an astounding amount of financial and non-financial information and documentation at the risk of benefits being terminated. As Ian Morrison has observed, "[u]nder the [OWA] ... administrators no longer have any statutory discretion to waive or modify requirements. ... [T]here are no reasons to suppose that these powers will not be used to further exclude and deter people in genuine need."⁶²

The inflexibility of the system does not allow the individual situations of claimants to be taken into account. Practical considerations including the time and cost involved in obtaining some of the required documents are often overlooked, exacerbating the worry of recipients that they would be cut off until the information was provided. In one case, "... a client was ordered to attend a CVP interview that took place in another community. She had no care, there was no bus service and a taxi would cost \$60. She was told she would be cut off if she did not attend."⁶³

In 2001-02, the CVP reviewed approximately 5 per cent of all OW cases and 0.6 per cent of ODSP cases, closing 22.5 per cent of OW cases and 4 per cent of ODSP cases reviewed. In the future, CVP is expected to result in the termination of 17 per cent of OW cases and 3 per cent of ODSP cases

⁶⁰ See Bennet, *supra* note 19 at 2164. Bennet observes, "[f]ixations on the form of proof of eligibility—on a particular type of document, or on a particular form of certification of a document—can be impassable logistical obstacles that bear little relationship to ensuring the integrity of the program" (*ibid.*).

⁶¹ Herd & Mitchell, *supra* note 14 at 35.

⁶² *Supra* note 7 at 30.

⁶³ Herd & Mitchell, *supra* note 14 at 42-43.

reviewed.⁶⁴

While the CVP system appears to have had a profound effect on some welfare recipients, the degree to which it can be hailed a success has been the subject of heated controversy. In his 2000 Report, the Provincial Auditor challenged the Ministry's figures on the benefits of the CVP system:

Case terminations occur for various reasons, including changes in economic conditions, changes in policies, as well as changes in administrative procedures. As a result of these multiple effects, the number of cases terminated as a result of changes in administrative practices, such as the Consolidated Verification Process (CVP), cannot be determined with absolute certainty. Instead, the incremental effect of the CVP initiative, for example, was estimated and included in the benefit pool based on a statistical model designed to obtain a 99% confidence level that benefits were not overstated.

Our concern remains that much of the benefits so determined could and should have been achieved had ministry staff adhered to the existing policies and procedures for determining recipient eligibility and implemented recommendations made in previous Provincial Auditor reports on the social assistance systems. As such it remains our view that these benefits are not clearly attributable to the changes inherent in the CVP initiative.⁶⁵

While the verdict may be out on whether CVP has paid for itself, it seems evident that it has resulted in further instances of what I have characterized as bureaucratic disentanglement. Here again, the modalities of the CVP—whether recipients receive assistance in responding to ministry requests for information, whether interviews are conducted, and if so, in what setting, how stringent to conduct the verification review, et cetera—all represent policy decisions which are inextricably linked to the exercise of discretion over eligibility for benefits.

D. *Internal Reconsiderations and Appeals to the Social Benefits Tribunal*

There is a small but growing literature on the non-emergence of disputes in social assistance decision making.⁶⁶ Lack of awareness of rights or procedures, cost, complexity of the appeals process, absence of assistance or advocacy, and barriers of a physical or other nature are all cited as reasons why welfare decision making is rarely subject to internal reconsideration and even more rarely still subject to appeal to a governing tribunal.

⁶⁴ *Ibid.* at 53.

⁶⁵ Ontario, Provincial Auditor, *Special Report on Accountability and Value for Money* (Toronto: Queen's Printer, 2000) at 265, online: <<http://www.auditor.on.ca/english/reports/en00/4eng00.pdf>> [*Special Report*].

⁶⁶ This literature is discussed in Cowan & Halliday, *supra* note 51 at 3.

To the extent that there is any accountability for the administrative process that welfare applicants and recipients must navigate in Ontario, it should come, presumably, in the form of internal reconsiderations and appeal to the Social Benefits Tribunal (SBT). At the telephone intake screening stage, a conclusion of ineligibility is followed by written notice, and applicants have 10 days from the receipt of such notice to object before the finding becomes a final decision with no right of appeal. If the objection is made in time, the applicant is entitled to an interview with a case manager, which will result either in a reversal of the intake screening finding or in that finding being upheld. Internal reviews following an in-person interview (usually the second stage of the process in OW applications; and usually the first stage in the ODSP application process), an internal review is also available—the reconsideration is conducted based on the paper record alone and decisions are rarely overturned.⁶⁷ The most significant aspect of the internal reconsideration is that it may give rise to additional delay and anxiety, and in some cases to the mistaken impression that an unsuccessful result exhausts the appeal recourse to applicants. Applicants whose initial negative determination has been upheld after the internal review, are entitled to apply in writing within thirty days to have the SBT consider an appeal. There is no mechanism, however, for ensuring that communicating this right occurs in a timely or complete fashion.

The SBT has jurisdiction over both OW and ODSP decision-making. In 2000-01, the SBT received upwards of 12,000 appeals, with about two-thirds coming from the DAU decisions. SBT appeals are time-consuming. It is not uncommon for a year to elapse between the filing of an appeal and the issuing of a decision. The SBT appeal typically requires additional paperwork, and has its own complex rules and processes; those appealing tend to have far more successful outcomes when represented than when unrepresented.⁶⁸ While judicial review of decisions made by the SBT is available (though only for errors of law), such challenges, given the time and resources involved, are exceedingly rare.⁶⁹ It is also worth noting that

⁶⁷ See Fraser, Wiley & Frencshkowski, *supra* note 14 at 23. The authors compiled ODSP Branch statistics for 2002 and found that initial negative determinations were changed 11 per cent of the time. In an interview with a former welfare official, he indicated that it was not uncommon for the internal review to be conducted, *de facto*, by the same official who handled the initial application. Even where the internal review is conducted by a supervisor, it will most often be the decision maker who is able to communicate his or her perspective in person while the affected party is limited to written submissions—a further barrier, of course, for those applicants who lack adequate literacy skills.

⁶⁸ Those with representation were successful 60 per cent of the time, while those who were unrepresented were successful 30 per cent of the time (*ibid.* at 25).

⁶⁹ See *e.g.* *Gallier v. Ontario*, [2000] O.J. No. 4541 (Div. Ct.). See also *Gray v. Ontario (Disability Support Program, Director)* (2002), 59 O.R. (3d) 364 (C.A.) [*Gray*] (discussed below).

SBT decisions are not binding precedents, either on courts or even on the SBT itself. Each decision is limited to its particular circumstances. Even where SBT appeals may rectify individual injustices,⁷⁰ they lack the scope or reach to affect issues of administrative design, or to remedy the bureaucratic disenfranchisement in the many cases which never reach the appeal stage.

E. *Conclusion*

The detailed overview of the application determination process is intended to convey a sense of both the daunting challenges that face applicants in the new SDM in Ontario, and of the link between the administrative features of a decision-making process and the substantive outcomes of that process. While advocacy reports such as “Discouraged, Diverted and Disenfranchised” and “Denial by Design” raise public awareness about the social assistance system and its human consequences, neither addresses the question: what has law got to do with it? Or, more to the point, is law part of the problem or part of the solution in relation to bureaucratic disenfranchisement?

III. LEGAL ACCOUNTABILITY AND WELFARE ADMINISTRATION

Public law (in which I include administrative and constitutional principles and doctrines) typically emphasizes two aspects of accountability—procedural and substantive.⁷¹ These might apply to the system of welfare administration in a number of ways. Procedurally, one might argue that the bureaucratic system through which one is compelled to navigate negates the chance to participate meaningfully in the decision-making process. Substantively, one might argue that the decisions of ineligibility are reached on the basis of arbitrary or irrelevant factors related to the administrative process. Below, I canvass the doctrinal hurdles such claims would likely face and the method by which I believe these hurdles may be overcome.

The purpose of this doctrinal analysis is twofold. First, I wish to

⁷⁰ All of the cases referred to in footnotes 52-59 are representative of such cases.

⁷¹ For an overview of each type of accountability, see Michael J. Bryant & Lorne Sossin, *Public Law* (Toronto: Carswell, 2002) at 66-73, c. 4. The distinction between substance and procedure in administrative law is particularly porous and the value of this doctrinal distinction is open to debate. See David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193.

point out how existing administrative and constitutional law constraints may provide a means to redress incidence of bureaucratic disenfranchisement in welfare eligibility decision making; and second, I wish to point out the inadequacy of those constraints as presently conceived. Adapting Mashaw's link between due process and dignitary values, I wish to suggest that administrative law doctrines cannot and should not be divorced from the process values that they reflect and reproduce. Process values such as equality of treatment, predictability, transparency, rationality, participation, and fairness are the cornerstones of our system of administrative law and fundamental to the dignity of those whose life opportunities are affected by administrative decision making. Bureaucratic disenfranchisement is a concern for administrative and constitutional law not merely because it introduces arbitrariness, discrimination, and subterfuge into the administrative process, but because it denies core aspects of human dignity to those adversely affected.

A. *In Search of Fairness: Disenfranchisement by Process*

Traditionally, advocating for welfare rights meant arguing for more process. In *Goldberg v. Kelly*,⁷² the U.S. Supreme Court confirmed that welfare benefits were statutory "entitlements" which could not be terminated without "due process."⁷³ In *Goldberg*, as well as in the subsequent case *Mathews v. Eldridge*,⁷⁴ the Court balanced the "individual's right to procedural protections ... against the governmental interest in keeping costs down."⁷⁵ However, for the U.S. Court, this balancing takes place in the individual, adjudicative context. In other words, the issue in *Goldberg* and its progeny was when hearings were necessary, not whether the administration of welfare itself was fair or reasonable.⁷⁶

⁷² 397 U.S. 254 (1970) [*Goldberg*].

⁷³ *Goldberg* confirmed that a public assistance payment could not be terminated to a particular recipient without affording him the opportunity for an "evidentiary hearing" because such benefits were a matter of statutory entitlement for those eligible to receive them. Therefore, terminating these benefits triggered the due process clause of the Fourteenth Amendment of the U.S. Constitution. *Ibid.* at 255, Brennan J.

⁷⁴ 424 U.S. 319 (1976).

⁷⁵ David J. Kennedy, "Due Process in a Privatized Welfare System" (1998) 64 Brook. L. Rev. 231 at 283.

⁷⁶ A similar point is made by William Simon in his appraisal of *Goldberg* on its 20th anniversary. Simon contends that *Goldberg* imported a private law notion of fairness into the social benefits arena, focused on the individual seeking relief, rather than structural relief. He notes, "*Goldberg* did not challenge basic assumptions about the nature of procedural fairness that the legal culture had developed principally in connection with private law claims. Its conception of fairness focused on claims initiated

In *Re Webb and Ontario Housing Corporation*,⁷⁷ the Ontario Court of Appeal recognized an analogous principle of administrative law in Canada.⁷⁸ It is perhaps of more than historical interest to note, however, that the Ontario Court of Appeal, in recognizing that social benefit recipients (and, by extension, social benefit applicants) are owed a degree of fairness, distanced this protection from the rationale applied in *Goldberg*. Associate Chief Justice Mackinnon noted, “there is no statutory entitlement in the appellant to either secure or remain in subsidized housing and I do not find the reasoning in *Goldberg* of assistance in resolving the problem which confronts this Court.”⁷⁹

Procedural fairness rights in social assistance settings are now well developed. Fairness rights are said to be “eminently variable,” and shift according to statutory and factual context. The case most responsible for extending the duty of fairness throughout the realm of administrative decision making, and particularly into the area of discretionary decision making, is *Baker v. Canada (Minister of Citizenship and Immigration)*.⁸⁰ This case involved a ministerial decision to deport a woman with Canadian-born children on the basis of seemingly biased notes taken by an immigration officer. Justice L’Heureux-Dubé found for the majority of the Supreme Court of Canada that the circumstances of Ms. Baker’s case required “full

by individuals for relief for themselves, and on an adjudicative process independent of and differentiated from the process of general or line administration. The Court had no occasion in *Goldberg* to adopt the perspective of ‘public law litigation’ or ‘structural’ relief that on occasion has led the federal courts to assess and remake the administrative processes of schools, prisons and mental health facilities, and it has not applied this perspective to the welfare system since then.” See “The Rule of Law and the Two Realms of Welfare Administration” (1990) 56 *Brooklyn L. Rev.* 777 at 777.

⁷⁷ (1978), 22 O.R. (2d) 257 (C.A.) [*Webb*].

⁷⁸ Prior to *Webb*, decisions regarding social benefits were considered “administrative” rather than “judicial” or “quasi-judicial” and therefore not subject to procedural fairness obligations. In *Nicholson v. Haldimond-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311, the Supreme Court of Canada had held that this distinction no longer had relevance for the reach of procedural obligations, thus opening the door for procedural rights in social welfare settings. In *Webb*, the issue was whether a tenant of a public housing corporation was entitled to notice and a right to be heard prior to receiving an eviction notice. The Court held that she was entitled to these fairness rights but that the housing corporation had satisfied them by providing her written notice of their intention and the basis for their action (the fact that the tenant was illiterate did not move the Court as there was evidence her children could have read her the letter in question). This is certainly an inauspicious case on which to found a welfare rights movement.

⁷⁹ *Webb*, *supra* note 77 at 263

⁸⁰ [1999] 2 S.C.R. 817 [*Baker*]. Ms. Baker applied for an exemption under the *Immigration Act* from the requirement that her application for permanent residence be made outside of Canada for humanitarian and compassionate reasons (primarily, the effect of her departure on her Canadian-born children), but her application was rejected by the Minister on the basis of the notes made by the immigration officer reviewing her case. The letter informing her of that fact contained no reasons.

and fair consideration of the issues,” and that the “claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.”⁸¹ It also found that the Minister was under some obligation to give reasons (which was satisfied by the provision of the immigration officer’s notes to the appellant’s counsel) and that the immigration officer’s reasons reflected bias.

In coming to this conclusion, Justice L’Heureux-Dubé found that the purpose of the participatory rights contained within the duty of procedural fairness was to ensure that “administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.” She also identified the following factors as relevant in determining the content of the duty of fairness:

the nature of the decision being made and process followed in making it (i.e. the closeness of the administrative process to judicial process);

the nature of the statutory scheme and the terms of the statute pursuant to which the body operates (i.e. whether or not there is a statutory right of appeal, whether the decision is final;

the importance of the decision to the individual or individuals affected;

the legitimate expectations of the person challenging the decision; and

the choices of procedures made by the agency itself.⁸²

The first and last of these criteria are of the most interest for an analysis of what might be characterized as “systemic fairness.” These criteria suggest that where a decision-making process appears more “administrative” than “judicial”—that is, where it is either more routinized, discretionary or benefit-conferring rather than rights-balancing—less fairness will be owed. There is little room in this analysis to probe behind the choice of procedures made by the agency to determine if those procedures themselves are “fair.” Rather, the fact that an administrative body saw fit to choose them will itself justify a measure of deference. *Baker* itself exemplifies this distinction. While the Court was highly critical of the immigration officer’s rationale for denying the discretionary exemption to

⁸¹ *Ibid.* at 843.

⁸² *Ibid.* at 838-40.

Ms. Baker on humanitarian and compassionate grounds, there was no inquiry into the system itself. In other words, the Court did not inquire into what kind of training, administrative culture, or discretionary criteria produce the kind of bias typified by the decision in Ms. Baker's case.⁸³

In the context of social assistance, the Ontario Court of Appeal discussed the post-*Baker* procedural obligations owed by decision makers in *Gray*.⁸⁴ *Gray* is the first challenge to a determination under the restructured welfare system in Ontario to reach the Court of Appeal. It involved an appeal from a decision of the SBT upholding the finding of the Disability Adjudication Unit (DAU) that an ODSP applicant was not a person with a disability within the meaning of the Act.⁸⁵ The DAU had accepted the evidence of the medical specialists which indicated that the applicant had a condition that resulted in some impairment but not of sufficient intensity or duration to meet the statutory condition (that is, that it precluded her from functioning in the workplace or that it placed substantial restrictions on her daily activities). This was enough to persuade the SBT to dismiss her appeal, and for the majority of the Divisional Court to conclude that the SBT had not erred in law. For the Court of Appeal, however, it was significant that the SBT had also found the applicant, whose submission was that her condition did result in substantial restrictions to her daily life, to be a credible witness. The Court of Appeal found it puzzling that the SBT both found the applicant to be credible but discounted the content of her submission.

The Court of Appeal observed that the ODSPA, as remedial legislation, should be interpreted "broadly and liberally" and in accordance with its purpose of "providing support to persons with disabilities."⁸⁶ Therefore, Chief Justice McMurtry concluded that any ambiguity should be resolved in favour of the applicant. In light of this standard, the failure of the SBT to account for why it appeared to ignore the applicant's description of her condition became a crucial omission. The ODSPA requires that the SBT include in its reasons its findings of fact and its conclusions based on those findings.⁸⁷ According to Chief Justice McMurtry, the SBT failed to

⁸³ While administrative law recognizes "institutional bias" as well as "individual bias," this category typically refers to concerns over multiple functions of administrative personnel (for example, where one official takes part in the investigative, prosecutorial and adjudicative phases of an administrative proceeding). It does not relate to the discriminatory or arbitrary effects of an administrative system.

⁸⁴ *Gray*, *supra* note 69. See also the discussion of analogous obligations in *Ginter v. Manitoba (Director, Employment and Income Assistance)*, 2004 M.B.C.A. 36.

⁸⁵ ODSPA, *supra* note 6, s.4(1).

⁸⁶ *Gray*, *supra* note 69 at 370.

⁸⁷ *Ibid.* at 371.

discharge its statutory, procedural obligation to the applicant. He cited with approval a Federal Court of Appeal decision, *Via Rail Canada v. Canada (National Transportation Agency)*,⁸⁸ which included the following passage on the content of reasons:

The duty to give reasons is only fulfilled if the reasons provided are adequate ... The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.⁸⁹

Thus, for the Ontario Court of Appeal, accounting for the “reasoning process” represented a core component of the procedural requirement to provide “reasons” (which *Baker* had left ambiguous). In my view, this is significant. If the “reasoning process” is affected by the administrative process within which the reasoning takes place (the importance of policy manuals, guidelines, and directives would be the easiest example, but by extension this could include restrictions imposed by intake scripts, database fields, or documentary requirements) then arguably such impacts should be considered in the duty to provide reasons as well.

While the present doctrines of procedural fairness have some salutary implications for the welfare system and may result in discretionary justice in individual cases, there is little in the development of administrative law to suggest courts will be willing to subject a service delivery model to a fairness analysis. This is so for reasons of principle and reasons of practicality. The principled reason is that procedural fairness as a common law norm is seen in primarily adjudicative terms—that is, was the affected individual given a “fair” hearing as intended by the governing legislation? This individual, adjudicative focus, together with the subsuming of fairness within legislative intent, results in systemic issues (and remedies) falling outside the purview of the court.⁹⁰ The practical reason is that systemic issues will almost never reach a court given the dense process for internal reconsideration and appeals. Because, as a general rule, all of

⁸⁸ [2001] 2 F.C. 25 at 35-36.

⁸⁹ Cited in *Gray*, *supra* note 69 at 374.

⁹⁰ I should add that some procedural fairness obligations are themselves statutory—these may be included within a statute, as are the appeal rights contained within the Ontario Works and Ontario Disability Support Plan legislation, or they may be contained in general procedural statutes, such as the Ontario *Statutory Powers Procedure Act* (R.S.O. 1990, c. S-22). They may also flow from quasi-constitutional statutes such as the *Canadian Bill of Rights* (S.C. 1960 c. 44, s. 2(e)) or the Quebec *Charter of Human Rights and Freedoms* (R.S.Q. c. C-12, s. 23). None of these instruments, however, speaks to constraints on government in the design of service delivery models.

these internal appeals must be exhausted prior to the availability of judicial review,⁹¹ the issue before the Court, as in *Gray*, will be the legal correctness of the SBT decision, not underlying flaws in the administrative system. In short, the fairness of the administrative system effectively lies outside the scope of administrative law as it is presently applied.

B. *Fairness, Procedure and Constitutional Norms*

In addition to the administrative law doctrine of procedural fairness, section 7 of the *Charter*, which provides that “everyone has a right to life, liberty and security of the person and a right not to be deprived thereof except in accordance with the principles of fundamental justice,”⁹² also provides procedural protections. For the most part, this section has been applied to the criminal justice context.⁹³ An important strand of constitutional jurisprudence, however, has focused on the procedural norms constitutionally required of the administrative process. These procedural rights are not absolute but rather vary according to the circumstances.⁹⁴

In *Singh v. Canada*,⁹⁵ the first case to explore the procedural fairness component of section 7, three justices of a six-justice majority found that the statutory denial of an oral hearing for refugee claimants violated section 7. Importantly, although this case was decided before the development of the proportionality *Oakes* standard for justifying *Charter* infringements under section 1, Justice Wilson asserted that “administrative convenience” was not an acceptable justification for denying a person fairness to which they were constitutionally entitled. The Supreme Court returned to the procedural dimension of *Charter* rights in *Morgentaler v. The Queen*,⁹⁶ in which the majority of the Supreme Court of Canada held that the procedure required for women to obtain an abortion, because of its delay, complexity, and uncertainty, violated the psychological dimension of the

⁹¹ For a discussion and application of this principle, see *Falkiner v. Ontario (Minister of Community and Social Services)* (1996), 140 D.L.R. (4th) 115 (Div. Ct.).

⁹² *Supra* note 12.

⁹³ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at 489, per McLachlin C.J. [*Gosselin*].

⁹⁴ Indeed, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at 61, the Court indicated that while the procedural rights provided by the *Charter* under s.7 are not identical to those rights provided at common law, the degree of fairness appropriate to particular circumstances should be assessed according to the same framework as the Court has developed for common law procedural protections, and in particular according to the same criteria set out in *Baker* for determining the appropriate degree of fairness owed in a particular administrative context.

⁹⁵ [1985] 1 S.C.R. 177.

⁹⁶ [1988] 1 S.C.R. 30 [*Morgentaler*].

security of the person protection under section 7.⁹⁷ Again, the Court held that this procedural violation could not be justified under section 1.

In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,⁹⁸ the Supreme Court linked the threshold of section 7, and therefore access to its procedural protections, with the notion of stigma and the protection of human dignity. Section 7 is engaged in an administrative process, in other words, where as a result of state action, a person is subject to stigma sufficient to interfere with the psychological dimension of the right to security of the person. Thus, in *G.(J.)*, where a woman faced a proceeding to extend a wardship application over her children without legal representation, Chief Justice Lamer, writing for the majority, found that:

When government actions triggers a hearing in which the interests protected by section 7 ... are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with *state-funded counsel*.⁹⁹

G.(J.) is a potentially important precedent as it links the complexity of a process and the capacities of the people affected with the overall fairness of the decision making. If the *Charter* requires a state-funded lawyer in a wardship proceeding, might it call for at least some minimal, state funded assistance for a vulnerable person attempting to comply with a detailed request for verification of documents? While this line of *Charter* jurisprudence has promise, as I have argued elsewhere,¹⁰⁰ the use of a subjective marker such as stigma in determining when section 7 procedural protections are triggered is an unfortunate choice for complex administrative proceedings. What is the stigma attached to being denied social assistance? Does it vary from person to person or across time and

⁹⁷ *Morgentaler* was a majority decision, but the reasons for the decision were fractured. Beetz J. and Estey J. took the narrowest approach, finding that by requiring a woman to get committee approval for medical treatment that was necessary to protect life and health, the impugned law infringed that woman's security of the person, and that the arbitrary fashion with which such approval was granted infringed principles of fundamental justice. Dickson C.J., with Lamer J., found that the delay caused by the administrative or approval process constituted an infringement of both the physical and the psychological aspects of the individual's right to security of the person. With respect to the latter, he accepted expert testimony that: "there is increased psychological stress imposed upon women who are forced to wait for abortions, and ... this stress is compounded by the uncertainty whether or not a therapeutic abortion committee will actually grant approval" (*ibid.* at 60).

⁹⁸ 1999] 3 S.C.R. 46 [*G.(J.)*].

⁹⁹ *Ibid.* at 57-58.

¹⁰⁰ Lorne Sossin, "Developments in Administrative Law: The 1999-2000 Term" (2000) 13 S.C.L.R. (2d) at 54.

place? Would that stigma change if the reason you are denied social assistance is your inability to complete required information over the phone, or your failure to provide required documentation?

The Supreme Court of Canada provides at least a partial answer to these questions in *Blencoe v. British Columbia (Human Rights Commission)*.¹⁰¹ This case involved administrative delay with respect to the hearing of a human rights complaint against a well-known former cabinet minister. The majority in *Blencoe*, in finding that the delay did not violate either common law or constitutional standards, held that section 7 of the *Charter* was not engaged because the stigma complained of resulted from the damage to the respondent's reputation through negative media attention. In other words, it was not state action (that is the delay in the administrative proceeding) that caused the stigma, but rather the circumstances of Blencoe's notoriety. The Court went on to stress that section 7 does not recognize a general right to be free from stigma, nor is there a general positive right to human dignity under the *Charter*. In order for a delay to breach section 7, Justice Bastarache concluded, it would have to be caused by the state and interfere with "profoundly intimate and personal," "essential" life choices.¹⁰²

The logic of *Blencoe*, and its close association of stigma, human dignity and professional reputation, all suggest that *Charter* procedural rights, while in some sense well-tailored to the complexity versus capacity issues raised by the welfare system, will not often be engaged in that setting. It is difficult to argue that a welfare applicant or recipient's "professional reputation" will be besmirched by the denial of benefits by the state. However, perhaps a more expansive understanding of human dignity as a constitutional norm would encompass the dehumanizing and alienating features of the administrative process accompanying the welfare system described above.

C. *In Search of Reasonableness: Disentitlement and the Merits*

As indicated above, discretionary decision making, such as determinations of how welfare eligibility is to be assessed, gives rise not only to procedural obligations but also to substantive obligations.¹⁰³

¹⁰¹ [2000] 2 S.C.R. 307 [*Blencoe*].

¹⁰² *Ibid.* at 311.

¹⁰³ The primary source of such obligations will be the empowering statute. In the social welfare sphere, however, such substantive constraints are diminishing. For example, the previous federal-provincial agreement for the funding of social assistance programs, called the Canada Assistance Plan, constrained the provinces from compelling recipients to work as a condition of receiving benefits, among

Highlighted in the oft-cited reasons of Justice Rand in *Roncarelli v. Duplessis*,¹⁰⁴ it is a principle of Canadian administrative and constitutional law that no grant of discretion is “untrammelled” and that “there is always a perspective within which a statute is intended to operate.”¹⁰⁵

Where an exercise of discretion is found to be arbitrary or undertaken for improper purposes or ulterior motives or in bad faith, then the decision maker, in effect, is held to have exceeded his or her statutory authority. Subsequently added to the list of grounds justifying judicial intervention was where a discretionary decision maker considered irrelevant factors or failed to consider relevant factors.¹⁰⁶ The proper purposes of a statutory discretion and the distinction between relevant and irrelevant factors flow from an analysis of legislative intent.

Section 1 of the *Ontario Works Act* sets out that the purpose of the *Act* is to establish a program that: (a) recognizes individual responsibility and promotes self reliance through employment; (b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed; (c) effectively serves people needing assistance;

other requirements. When that shared cost program was replaced by the block grant Canada Health and Social Transfer, the national standards constraining provincial welfare programs were eliminated (with the exception of the requirement that no residency test be imposed on welfare recipients). For a discussion of the legality of the elimination of national standards, see Lorne Sossin, “Salvaging the Welfare State? The Prospects for Judicial Review of the Canada Health & Social Transfer” (1998) 21 Dal. L.J. 141.

¹⁰⁴ [1959] S.C.R. 121.

¹⁰⁵ *Ibid.* at 140. In *Baker*, *supra* 79 note at 853-54, L'Heureux-Dubé J. summarized the approach of Canadian administrative law to the substantive review of discretion in the following terms:

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations. ... A general doctrine of ‘unreasonableness’ has also sometimes been applied to discretionary decisions. ... In my opinion, these doctrines incorporate two central ideas—that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by the courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. ... However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038).

¹⁰⁶ See *Sheehan v. Ontario (Criminal Injuries Compensation Board)* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); and *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

and (d) is accountable to the taxpayers of Ontario.¹⁰⁷ The third of these four principles would seem the most relevant to the SDM. If the Ministry announced an explicit policy of bureaucratic disentitlement, presumably it could be said to be at odds with the purpose of “effectively” serving people needing assistance. Of course, this is not the Ministry’s policy. In fact, Directive 2.0, “Principles for Delivery,” sets forth five core principles said to animate the delivery of welfare services in Ontario, and states that Ontario Works “respects people’s dignity; enhances their self-esteem; fosters independence, self-reliance and community contribution and promotes employment.”¹⁰⁸

The connection between substantive review for misuse of discretion and the system of welfare administration relates to these jurisdictional constraints. Arguably, the administrative barriers created by the new SDM, whether as a matter of design or execution, come very close to any definition of “arbitrary.” While one may disagree on where this line is, it is hard to accept that the line does not exist. If a benefit to single mothers, for example, required that applicants could only meet the eligibility criteria by showing up at night to a remote office, surely the denial of a benefit to those unable to find a babysitter or unable to access the office could not be considered “reasonable”?¹⁰⁹

Try as it might, the Supreme Court has yet to articulate a tenable basis on which to distinguish judicial intervention in the decision-making process from judicial intervention in the decision-making outcome.¹¹⁰ As

¹⁰⁷ *Supra* note 5, s. 1.

¹⁰⁸ Ontario, Ministry of Community and Social Services (September 2001) at 2, online: <http://www.cfcs.gov.on.ca/NR/MCFCS/OW/English/02_0.pdf>. The principles are mostly inscrutable but are accompanied by clear mandates. For example, Principle 1 states that “Delivery agents must focus on supporting participants to participate actively in determining and taking steps that represent the shortest route to employment for the individual participant and on other measures to support system integrity” (*ibid.*). The accompanying notes state that this principle is demonstrated by, among other things, “the ability to identify and follow up high risk cases to reduce fraud” (*ibid.* at 3).

¹⁰⁹ This scenario is not as far fetched as it might sound. One of the strategies routinely used in the southern American states to ensure federal benefits did not reach African American sharecroppers was to only open the welfare offices during hours in which the harvesting of crops took place. See Michael R. Sosin, “Legal Rights and Welfare Change, 1960-1980” in Sheldon H. Danziger & Daniel Weinberg, eds., *Fighting Poverty: What Works at What Doesn’t* (Cambridge, Mass: Harvard University Press, 1986) at 267.

¹¹⁰ The Court’s most recent attempt to do this took place in *Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539. In that case, the Court nullified the appointment of retired judges to chair arbitration panels in the hospital field because the Minister had failed to consider certain relevant factors—namely whether the retired judges were mutually acceptable to the parties. The majority concludes that the decision was both procedurally fair (because the Minister had never promised that the appointments would be acceptable and therefore the unions had no legitimate expectation that they would be) and patently unreasonable (because the Minister nonetheless

Baker illustrates, bias is as much a procedural as a substantive concern, and the requirement that reasons be given cannot be understood divorced from the requirement that a decision be reasonable. By the same token, there is no basis that I can see for subjecting the reasonableness of a discretionary (that is, not arbitrary) decision to judicial scrutiny but not the reasonableness of the administrative framework which shapes, and in some cases determines, those decisions.

1. Substantive Review and The *Charter's* Application to Welfare Administration Revisited

The departure point for any discussion of substantive constraint in the design of social assistance benefits is that there is no constitutional right to welfare in Canada. Following a series of lower court decisions on the question,¹¹¹ the Supreme Court of Canada finally tackled this issue in *Gosselin v. Quebec*.¹¹² In that case, a woman had her social assistance benefits cut after failing to participate in a mandatory job training program for recipients under the age of 30. With respect to whether this reduction in benefits constituted a violation of substantive guarantees under section 7, Chief Justice McLachlin, writing for the majority, held that it did not (although she left the door slightly ajar to the possibility that substantive rights might be recognized in the future):

One day section 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] AC 124, the *Canadian Charter* must be viewed as "living tree capable of growth and expansion within its natural limits": see *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. ... I leave open the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail

had an obligation to consider the acceptability of the appointees to the unions).

¹¹¹ See, for example, *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.) (in which the Court rejected the claim that the requirement of a deposit by the utilities commission had an adverse impact on the poor and violated s. 7 of the *Charter*); *Conrad v. Halifax (County)* (1993), 124 N.S.R. (2d) 251 (S.C.) (holding that economic benefits such as social welfare lay beyond the scope of s. 7); *Bernard v. Dartmouth Housing Authority* (1988), 88 N.S.R. (2d) 190 (rejecting the argument that the Public Housing authority had violated the appellant's right to security of the person by giving her notice to vacate); *Fernandes v. Manitoba (Director of Social Services (Winnipeg Central))* (1992), 93 D.L.R. (4th) 402 (Man. C.A.) (in which claimant sought increase in welfare payments to permit him to receive medical care at home rather than in a hospital. The court dismissed claim holding that the right to a certain standard of living or way of life could not be protected under s. 7).

¹¹² *Supra* note 93.

platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.¹¹³

This is not to say that the provision of social assistance is not subject to substantive constraints, typically under the equality freedoms guaranteed under section 15.¹¹⁴

Bureaucratic disentanglement, however, is not a clear sanction in the same way as are penalties for not participating in workfare. It is, as discussed above, a series of structural and situational features of the welfare eligibility process which together have the effect of discouraging applicants and demoralizing recipients. Can the *Charter* hold government accountable for the substantive design of administrative systems? The most significant case exploring the application of the *Charter* where the administrative system is implicated in a discretionary determination is *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.¹¹⁵ The discretionary authority at issue in this case concerns the power of customs officials to seize imported goods that meet the obscenity test under s. 163 of the *Criminal Code*. Little Sisters is a bookshop in Vancouver specializing in lesbian-oriented material whose owners claimed that their *Charter* rights were violated by the targeting actions of Customs officers in seizing, over a period of several years, materials that Little Sisters sought to import from the United States.

Justice Binnie, writing for the majority, characterized the administration of the *Customs Act* (which included a technical manual depicting as obscene representations that the Supreme Court had held not

¹¹³ *Ibid.* at 491-92. In one of the first post-*Gosselin* challenges to involve a *Charter* right to welfare, a number of advocacy groups in Ontario are challenging the lifetime welfare ban imposed as a penalty against those found to have engaged in fraud. The Court earlier decided that an injunction against this practice was not appropriate, but left the merits of the challenge to be decided in a hearing scheduled for the Fall of 2003. See *Broomer v. Ontario (Attorney General)*, [2002] O.J. No 2196 (Sup. Ct. J.). The Liberal government, elected in the Fall of 2003, adjourned the litigation and announced it would eliminate the lifetime ban.

¹¹⁴ Courts traditionally have been unwilling to recognize recipients of social benefits as a discrete and insular minority for the purposes of s.15 of the *Charter* (see Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65; and Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257). Therefore most claimants have had to advance other markers as indicia of discrimination (e.g. gender, marital status, status in public housing, etc). See, for example, *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, (1993), 101 D.L.R. (4th) 224 (N.S.C.A.); and Helena Orton, "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*" (1990) 19 Man. L.J. 288. Notably, "social assistance recipient" was recognized by the Ontario Court of Appeal as an analogous ground in s. 15 of the *Charter* in *Falkiner v. Ontario*, (2002) 59 O.R. (3d) 481 [*Falkiner*]. Leave to appeal to the Supreme Court of Canada was granted in March 2003.

¹¹⁵ [2000] 2 S.C.R. 1120 [*Little Sisters*].

to be obscene, inadequate training and resources, and a corrosive administrative culture that placed the least able officials in charge of obscenity determinations) as oppressive and dismissive of Little Sisters' freedom of expression. He concluded that the effect of the seizures of material at issue—whether intended or not—was to isolate and disparage the appellants on the basis of their sexual orientation. As a result, the Court granted Little Sisters declaratory remedies vindicating its objections to particular seizures. The majority declined, however, to strike down the legislative power to seize obscene material, which Little Sisters had requested as a remedy. Justice Binnie was also unwilling to subject the administrative system underlying obscenity determinations to *Charter* scrutiny. He concluded:

The trial judge concluded that Customs' failure to make Memorandum D9-1-1 conform to the Justice Department opinion on the definition of obscenity violated the appellants' *Charter* rights. However, I agree with the British Columbia Court of Appeal that the trial judge put too much weight on the Memorandum, which was nothing more than an internal administrative aid to Customs inspectors. It was not law. It could never have been relied upon by Customs in court to defend a challenged prohibition. The failure of Customs to keep the document updated is deplorable public administration, because use of the defective guide led to erroneous decisions that imposed an unnecessary administrative burden and cost on importers and Customs officers alike. Where an importer could not have afforded to carry the fight to the courts a defective Memorandum D9-1-1 may have directly contributed to a denial of constitutional rights. It is the statutory decision, however, not the manual, that constituted the denial. It is simply not feasible for the courts to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of the decisions, not the quality of the guidebooks, although of course the fate of the two are not unrelated.¹¹⁶

I have taken issue elsewhere with Justice Binnie's characterization of the administrative manual as not "law."¹¹⁷ My interest in this passage here is Justice Binnie's implication that the *Charter* is not concerned with "deplorable public administration." According to the Court, the *Charter* may remedy individual discretionary decisions only where they violate *Charter* protections, and the legislative provision granting the discretion only where any exercise of the power would violate the *Charter*.¹¹⁸ Writing for the minority, Justice Iacobucci drew on another line of *Charter* case law,

¹¹⁶ *Ibid.* at 1173.

¹¹⁷ Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2003) 45 Canadian Public Administration 465 at 481.

¹¹⁸ See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. For further discussion of this "two track" approach to discretion, see *ibid.* and Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1 at 3-5.

notably reflected by *Morgentaler*,¹¹⁹ under which a court could strike down a legislative scheme that did not adequately constrain administrative discretion or prevent unconstitutional exercises of authority.

Where the problem is not with particular decisions or with general legislation, however, the abrogation of *Charter* rights through a discriminatory or arbitrary eligibility process would appear to lie outside the reach of the courts. Lower court decisions, by contrast, appear to have recognized the influence that administrative procedures have over decision making.

In *Glasgow v. Nova Scotia (Minister of Community Services)*,¹²⁰ for example, the Nova Scotia Supreme Court reviewed a Department of Community Services policy guideline that required income assistance applicants to sign a consent form authorizing the Department to gather a wide range of information from third parties in order to assess their eligibility. The applicant argued that the policy constituted a violation of the right to privacy as provided by section 7 of the *Charter* among other grounds. While Justice Davison did not agree that the policy violated *Charter* rights, it was not because such an administrative rule could not in principle violate the *Charter*.¹²¹

There is of course a difference between subjecting a particular policy to *Charter* scrutiny and an entire administrative system of service delivery. *Glasgow* and *Little Sisters* hold out some promise that particular, egregious practices or cases may be remedied under the *Charter*, but this sidesteps the issue of legal accountability for administrative design. Interestingly, in *Little Sisters*, Justice Iacobucci, in dissent, addressed the administrative design question directly. He was no more prepared than Justice Binnie to subject the administrative preferences of the Government to judicial scrutiny, but because in his view declaratory remedies were inadequate to deal with the systemic flaws in the administration of obscenity seizures, Justice Iacobucci was prepared to strike down the legislation, and require the government to redesign the administration of the *Customs Act* to include greater procedural safeguards and to leave the

¹¹⁹ *Supra* note 96.

¹²⁰ (1999), 178 D.L.R. (4th) 181 [*Glasgow*]. This case and its implications are discussed further in Pottie & Sossin, *supra* note 1.

¹²¹ *Glasgow, ibid.* at 188-91. The policy was invalidated by the court on other grounds, namely that by placing a direct obligation on applicants, the policy went beyond that which is properly the subject of a guideline as opposed to legislation or regulations, and in authorizing the Department to gather information irrelevant to a determination of eligibility (such as employee work habits, behaviour as a tenant, or health information), the policy was invalid as a breach of procedural fairness.

determination of obscenity to a more quasi-judicial process.¹²²

The relationship between public law accountability and public administration in Canada is complex and not always consistently defined by courts. The preponderance of precedent would appear to suggest an uphill climb for a litigant seeking a judicial remedy for having been denied benefits due to the maladministration of a call centre or the excessive document requests of the verification process. However, in my view, as elaborated above, there is simply no principled basis on which to exclude judicial review for bureaucratic disentanglement in the welfare system due to administrative design or a service delivery model.

2. Discretionary Justice in an Era of Privatized Welfare

Having set out what an approach to discretionary justice might look like in the face of the realities of welfare administration, the question remains how resilient this form of accountability will be when confronted with the increasing trend toward contracting out welfare administration. Because the phenomenon of contracting out welfare administration is far more widespread in the United States than Canada, most of the literature on this subject arises from American settings. There are signs, however, that as in so many other social assistance settings (devolution, workfare, etc.),¹²³ the American influence on the development of welfare administration in Canada may be significant. Indeed, the "Business Transformation Project" initiated by the Ontario Ministry of Community, Family, and Children's Services, which ushered in the new SDM, was itself an important experiment in contracting out. Andersen (now Accenture), a management consulting firm, designed and managed the new system for welfare, and shared in the "savings" which accrued to government through more efficient use of technology and, of course, through a reduced welfare caseload.¹²⁴ While there are many perspectives from which to analyze contracting out social services, I wish to emphasize the question of legal accountability for forms

¹²² *Little Sisters*, *supra* note 115 at 1251-54.

¹²³ See Peck, *supra* note 11 at 215.

¹²⁴ For a detailed discussion of the contracting out process, see Art Daniels & Bonnie Ewart, "Transforming Ontario's Social Assistance Delivery System" (2000) 1 *Canadian Government Executive* 26. The contract with Accenture was worth around \$180 million. This included fees for service and certain arrangements entitled to permit Accenture to share in the Government's savings. The Provincial Auditor was highly critical of the government's statement of the benefits of the BTP, and therefore of the compensation which Accenture was receiving. See Ontario, Provincial Auditor, *Special Report*, *supra* note 64 at 258-66 and Ontario, Provincial Auditor, *Annual Report* (Toronto: Queen's Printer, 1998) at 31-56, online: <<http://www.auditor.on.ca/english/reports/e98/301.pdf>>. For discussion, see Borins, *supra* note 16 at 43-46.

of administering social assistance services. The issue is essentially whether, and in what circumstances, administrative law duties may be owed by private firms delivering welfare services. The discussion below canvasses both American and Canadian approaches to addressing this question.

a. The American experience

The American approach to the question of legal accountability for welfare administration has focused, of late, on the sweeping trend to privatize welfare administration at the state level. This trend encompasses “contracting, vouchers, subsidies, franchises, and tax credits, to more extreme forms such as load-shedding, in which the government eliminates its role in certain areas by selling its assets to the private sector or withdrawing from providing a service altogether.”¹²⁵ The most common form of American privatization is contracting out service provision.¹²⁶ Welfare privatization contracts can encompass the entire caseload (as in Milwaukee) or job development programs only (as in Arizona).¹²⁷ In this context, there is clearly no single way to ensure legal accountability. Even if there were a cohesive approach to privatization, the legal landscape would remain muddled. As Gilman says: “At present, in a privatized welfare jurisdiction, there is simply no reliable, unified theory for enforcing procedural norms. Just as the welfare system has been decentralized and devolved, so will be the law that governs it.”¹²⁸

The glue that once bound welfare rights—that social assistance was a statutory entitlement—has lost its hold. As discussed above, in 1970, *Goldberg*¹²⁹ established that welfare benefits were an entitlement. Such status conferred property rights upon “persons qualified to receive [benefits].”¹³⁰ This led to a variety of decisions implicating the welfare

¹²⁵ See Michele Estrin Gilman, “Legal Accountability in an Era of Privatized Welfare” (2001) 89 Cal. L. Rev. 569 at 594 [footnote omitted]. See also Jon Michaels, “Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform,” (2004) 34 Seton Hall L. Rev. 573.

¹²⁶ See Gilman, *ibid.* at 594. See also Dru Stevenson, “Privatization of Welfare Services: Delegation by Commercial Contract” (2003) 45 Ariz. L. Rev. 83 at 105-115.

¹²⁷ See Gilman, *supra* note 125 at 592.

¹²⁸ *Ibid.* at 625.

¹²⁹ *Supra* note 72.

¹³⁰ See Gilman, *ibid.* at 604; Kennedy, *supra* note 75 at 239-42. This implies that not only recipients but also qualified applicants enjoyed entitlement status.

system, including *Perez v. Lavine*,¹³¹ in which New York Social Services were ordered to revise their administrative procedures to ensure that applicants could pick up application forms within a reasonable time. Twenty-six years later, the *Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)*¹³² changed the nature of welfare administration in America. The *PRWORA* states unequivocally that it "shall not be interpreted to entitle any individual or family to assistance under any State program funded under [the Act]."¹³³ This language effectively passes the onus of allowing an entitlement to the states, some of which statutorily deny an entitlement, some of which reserve one.¹³⁴

There remains a school of thought that contends that even under the new regime of devolved and decentralized social assistance, a core entitlement persists.¹³⁵ Indeed, Gilman asserts that "most scholars... as well as the only two courts to address it, have concluded that TANF [Temporary Assistance for Needy Families, the welfare program created by the *PRWORA*] benefits are still entitlements."¹³⁶ The content of the *PRWORA*—the granting of economic assistance to qualified applicants—suggests that the benefits remain an entitlement irrespective of how the legislature characterizes the benefits.¹³⁷ Furthermore, to some it appears that Congress's intent was not to remove due process protection, but to emphasize the temporariness of the benefits.¹³⁸

The most important public law doctrine in the context of accountability for welfare privatization would appear to be that of "state action." In order for a welfare provider to be covered by the due process

¹³¹ 412 F. Supp. 1340 at 1356-7 (S.D.N.Y. 1976).

¹³² Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.). This Act changed the relationship between the federal government and the states from an entitlement based grant to a conditional block grant to provide for temporary social benefits to those in need (initially limited to a 5 year term).

¹³³ *Ibid.* § 601(b).

¹³⁴ See Gilman, *supra* note 125 at 606. For a case exploring the extent of statutory obligation in relation to welfare administration, see *Reynolds v. Giuliani*, 35 F. Supp. 2d 331 at 344-45 (S.D.N.Y. 1999), modified 43 F. Supp. 2d 492 (S.D.N.Y. 2000). See also Alice Bers, "Reforming Welfare after Welfare Reform: *Reynolds v. Giuliani* 118 F. Supp. 2d 352 (S.D.N.Y. 2000)" (2001) 36 Harv. C.R.-C.L. L. Rev. 571.

¹³⁵ *Ibid.* See also Kennedy, *supra* note 75 at 281-88.

¹³⁶ *Supra* note 125 at 606 [footnotes omitted].

¹³⁷ *Ibid.* at 606-07. See also Kennedy, *supra* note 75 at 282.

¹³⁸ See Gilman, *supra* note 125 at 607. See also Michelle VanWiggeren, "Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare by Altering Federal State Relations and Recipients' Due Process Rights" (1997) 46 Emory L.J. 1327 at 1359-61.

obligations under the American Constitution, it is first necessary to establish that it is a state actor. In *Lugar v. Edmondson Oil Co.*,¹³⁹ the Court established the test to determine when a private actor can be characterized as a state actor. The test is two-pronged: (1) the “nexus” analysis, that is, the degree of state involvement in the action and (2) the “public function” analysis, that is, whether a public function is being carried out.¹⁴⁰ In the context of social services privatization, the two leading cases are *Blum v. Yaretsky*¹⁴¹ and *Rendell-Baker v. Kohn*.¹⁴² In each case, the Court held that the private actor’s discretionary power was sufficiently independent of any public funding or regulation administered by the state to be free of public law obligations.

In *Rendell-Baker*, the Court stated that in order to satisfy the “public function” analysis the impugned action must have been “traditionally the exclusive prerogative of the state.”¹⁴³ In this instance, private school employees were held to not be state actors because school districts had the option of providing educational services publicly or privately. Gilman notes that this is a self-defeating proposition—any service that has the option of being privatized is therefore not “the exclusive prerogative of the state.”¹⁴⁴ This is just one of several critiques of the state action test.¹⁴⁵ There are prospects of change however—some lower courts have recently found private conduct to constitute state action in other contexts, such as in prisons.¹⁴⁶

In addition to the state action issue, another dynamic of legal accountability for privatized welfare in the United States is the non-delegable duty. This theory holds that there are certain functions that government must itself perform. The concern is that delegates will act in

¹³⁹ 457 U.S. 922 (1982).

¹⁴⁰ See Gilman, *supra* note 125 at 611-12.

¹⁴¹ 457 U.S. 991 (1982).

¹⁴² 457 U.S. 830 (1982) [*Rendell-Baker*].

¹⁴³ *Ibid.* at 849.

¹⁴⁴ *Supra* note 125 at 614.

¹⁴⁵ *Ibid.* at 614-21. Other problems include a misplaced focus on the state’s intent, and a misplaced focus on the actor as opposed to the conduct. See also Henry Freedman *et al.*, “Uncharted Terrain: The Intersection of Privatization and Welfare” (2002) 35 Clearinghouse Rev. 557.

¹⁴⁶ See Jody Freeman, “Extending Public Law Norms through Privatization” (2003) 116 Harv. L. Rev. 1285 at 1319. A further problem with state action is that of qualified immunity. If a private provider is found to be a state actor, they might claim immunity “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” See Gilman, *supra* note 125 at 624 quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

their own interests, whereas (theoretically) government would not.¹⁴⁷ Non-delegable duty is rarely successful when challenging a delegation to another branch or level of government.¹⁴⁸ Some functions are already non-delegable, like elections and municipal government, and as privatization becomes more common it is reasonable to expect that this list could grow.¹⁴⁹ The Texas Supreme Court has said that they "believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts."¹⁵⁰ The Seventh Circuit federal appeals court recently distinguished between the delegation of legislative-type power, which is usually acceptable, and the delegation of judicial-type power, which is not.¹⁵¹ Stevenson contends that welfare eligibility determinations would be a judicial function, and hence contestable.¹⁵² However, he admits that "the line between legislative and adjudicative functions is sometimes blurred."¹⁵³

A third public law doctrine is that of due process. Prior to the enactment of the *PRWORA*, Kennedy notes that there were three primary elements of due process owed to welfare claimants: the right to apply and receive; the right to fair notice, and; the right to be heard.¹⁵⁴ Kennedy concedes that poor administration or even incompetence on its own would be an insufficient basis for an action claiming a violation of the right to apply and receive welfare.¹⁵⁵ However, he asserts that "administrative dissuasion, onerous application or receipt procedures, and bureaucratic disenfranchisement" all may be valid grounds.¹⁵⁶ Kennedy's main concern with respect to the right to fair notice is in regards to the EBT (Electronic Benefit Transfer) system of welfare benefit distribution.¹⁵⁷ Most electronic fund transfers are governed by Regulation E, which, pursuant to the *Electronic Fund Transfer Act (EFTA)*,¹⁵⁸ establishes a set of procedures for fair notice

¹⁴⁷ See Stevenson, *supra* note 126 at 98-99.

¹⁴⁸ *Ibid.* at 94-95.

¹⁴⁹ See Freeman, *supra* note 146 at 1318.

¹⁵⁰ See Stevenson, *supra* note 126 at 97 (quoting *Tex. Boll Weevil Eradication Found., Inc. v. Lewellyn*, 952 S.W.2d 454 (Tex. 1997) at 472).

¹⁵¹ *Ibid.* at 99-100 (discussing *Club Misty, Inc. v. Laski*, 208 F. 3d 615 (7th Cir. 2000)).

¹⁵² *Ibid.* at 100.

¹⁵³ *Ibid.*

¹⁵⁴ *Supra* note 75 at 286-87.

¹⁵⁵ *Ibid.* at 293.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at 295-300.

¹⁵⁸ 15 U.S.C. § 1693-1693r (1996).

and resolution of errors and liability questions. Although EBT transactions fit the definition of fund transfers set out in the *EFTA* they are not covered by Regulation E, which leaves welfare recipients with substantially weaker due process guarantees than those enjoyed by ATM users.¹⁵⁹ While the *PRWORA* may have removed the statutory right to a hearing, Kennedy argues that because private welfare providers have a financial interest, even a fiduciary duty (that is, to maximize shareholder value), to disentitle as many recipients as possible, the right to a fair hearing is more important than ever.¹⁶⁰

The absence of a statutory right of action under the *PRWORA* makes federal suits seeking to impose due process requirements unlikely to succeed. At the state level, one alternative is the APA (Administrative Procedure Acts), which “provide standing to statutory beneficiaries to enforce agency accountability.”¹⁶¹ However, this again requires establishing that the privatizer is a state actor; historically, this has been a difficult hurdle to meet in the context of the APA.¹⁶² Another state-level alternative is to invoke the doctrine of mandamus. This is a common law method to “compel performance of statutory duties.”¹⁶³ Mandamus is, however, rarely used; it is ineffective against the use of discretion and, like other means of holding private welfare providers accountable, it requires the establishment of state action.¹⁶⁴

Not all forms of legal accountability under public law involve judicial review on administrative or constitutional grounds. Private law doctrines also offer potential grounds for legal accountability. Litigants may bring estoppel claims against private welfare service providers, for example, where a welfare recipient suffers personal injury as a result of maladministration or improper disentanglement. However, government actors are generally immune from tort claims. In *Schweiker v. Hansen*¹⁶⁵ the U.S. Supreme Court refused an estoppel claim brought against an employee at a Social Security office who had mistakenly denied a claimant’s benefits. The Court ruled that government actors could be liable in tort only in cases involving blatant misconduct, or where the public interest is overwhelmed

¹⁵⁹ *Supra* note 75 at 295.

¹⁶⁰ *Supra* note 75 at 301-05.

¹⁶¹ See Gilman, *supra* note 125 at 633 [footnote omitted].

¹⁶² *Ibid.* See also Freeman, *supra* note 146 at 1305 [footnotes omitted].

¹⁶³ See Gilman, *supra* note 125 at 634 [footnote omitted].

¹⁶⁴ *Ibid.*

¹⁶⁵ 450 U.S. 785 (1981).

by the gravity of the private injury.¹⁶⁶

Cumulatively, these various legal strategies represent important but limited forms of accountability. Certainly, privatized welfare administration is subject to far less judicial scrutiny in the United States than public welfare administration—and this of course is one of the most persuasive arguments for privatization. The view that “welfare rights” have become a barrier to progressive change—to “ending welfare”—has significant resonance in American policy circles. Canadian public law has not been marked by a welfare rights tradition, as discussed above, and initiatives to outsource or privatize the delivery and administration of social services have been tentative and mostly at the margins to this point.¹⁶⁷ The Ontario experience with the Business Transformation Project and its reliance on private management consultants to redesign welfare administration is arguably a harbinger of greater private involvement in the delivery of welfare. The time is thus ripe for a consideration of the principles which should animate the legal accountability for system design in the welfare context.

b. The Canadian experience

In light of the limitations of Canadian public law in the face of bureaucratic disenfranchisement at a systemic level, legal accountability for the privatization of welfare administration would appear at first glance to be minimal. In this analysis, I have suggested that legal accountability should be strengthened, and that this accountability should be tied to core principles relating to discretionary justice. The foremost of these principles would be: (1) that any aspect of the discretionary decision-making process that has a significant bearing on the process and outcome of applying statutory authority should be subject to legal accountability. At a minimum, this principle would mean that standards of fairness and reasonableness apply to administrative designs. To this principle, I would add two others which address the possibility of privatized welfare administration: (2) government cannot contract out of legal accountability for welfare design by delegating or outsourcing specific aspects of the decision-making

¹⁶⁶ See Gilman, *supra* note 125 at 639-40.

¹⁶⁷ One exception to this assertion relates to the delivery of children's and developmental social services, which has a long history of being publicly funded but administered and delivered by private (albeit non-profit) institutions. For discussion, see Lorne Sossin, “Dilemmas of Evaluation, Accountability and Politics: Contracting Out Social Services in Ontario” (Research Paper Series No. 40, Report to the Panel on the Role of Government, October 2003), online: <<http://www.law-lib.utoronto.ca/investing/reports/rp40.pdf>>.

process; and (3) legal accountability should be undertaken in the forum most likely to lead to effective monitoring, enforcement and remedies against bureaucratic disentanglement. Having spent much of this article elaborating on the first principle, I would like to conclude with a brief word on the second and third principles, in the hope that this might be taken as a point of departure for further reflection and research.

What is the relevance of public law principles in the face of privatized social assistance delivery? The reach of public law in Canada in the face of privatization and deregulation is at best uncertain.¹⁶⁸ Constitutional law may be used to ensure that the government does not abdicate its constitutional responsibilities through having private entities deliver publicly funded services. As a matter of constitutional law in Canada, the Supreme Court has concluded that at least some social services are inherently governmental irrespective of who delivers them. This issue was addressed, in a roundabout way, by the Court in *Eldridge v. British Columbia (Attorney General)*.¹⁶⁹ In *Eldridge*, the matter before the Court was whether a clinic had violated the equality rights under the *Charter of Rights* by failing to provide translation services for a deaf woman receiving medical services at the clinic. In order for the *Charter* to apply, the Court first had to conclude that the clinic's activities constituted "government action" under section 32 of the *Charter*.¹⁷⁰

In the course of concluding that the *Charter* did apply, Justice La Forest, writing for the Court, noted that "[t]here are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy."¹⁷¹ Accordingly, Justice La Forest concluded that "a private entity may be subject to the *Charter* in respect of certain inherently governmental actions,"¹⁷² and therefore the fact that the provider of health services in that case was a private clinic did not alter the fact that its decisions were "governmental actions."

Having addressed the issue of whether the government's responsibility for fairness and reasonableness in the design of welfare

¹⁶⁸ See David Mullan & Antonella Ceddia, "The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective" (2003) 10 Ind. J. Global Legal Stud. 199.

¹⁶⁹ [1997] 3 S.C.R. 624 [*Eldridge*].

¹⁷⁰ *Ibid.* at 643.

¹⁷¹ *Ibid.* at 655.

¹⁷² *Ibid.* at 659.

eligibility could be contracted out, I now turn briefly to an elaboration of the third principle, that legal accountability should be undertaken in the forum most likely to lead to effective monitoring, enforcement and remedies against bureaucratic disentanglement.

It is clear that traditional forms of judicial review represent a poor forum of legal oversight for the administrative design of social assistance delivery. They require time, knowledge and resources which social assistance applicants and recipients do not have in great supply. While I have argued public law principles ought to impose standards of fairness and reasonableness on welfare administration, it is important to keep an open mind as to the diverse forms of public investigations and reviews which might achieve this accountability. Below, I canvass a few such options, including the Ombudsman, the Provincial Auditor, inquests and public inquiries, and judicial intervention through, among other litigation strategies, class actions on behalf of welfare recipients or applicants.

c. The Ombudsman

The Ombudsman's office has jurisdiction over accountability for the delivery of public services. Section 14(1) of the Ontario *Ombudsman Act* provides that:

The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity.¹⁷³

While most complaints to the Ombudsman relate to individual decisions, this does present an opportunity to bring public scrutiny to the relationship between individual outcomes and systemic disentanglement practices. Recently, the Advocacy Clinic for Tenants made a submission to the Ombudsman outlining systemic concerns with the Ontario Rental Housing SBT. The Income Security Advocacy Centre has made a similar submission with respect to the Social Benefits SBT. While this option holds out significant promise in exposing bureaucratic disentanglement practices, the Ombudsman has no power to enforce any recommendations made.¹⁷⁴

¹⁷³ R.S.O. 1990, c. O-6.

¹⁷⁴ For discussion, see Mary A. Marshall & Linda C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution (1995) 34:1 Alta L. Rev. 215. Marshall and Reif have recommended that the Ombudsman's supervisory role over the administration of public services should continue, even as the delivery of these services is privatized or devolved to local or regional bodies (*ibid.* at 224).

d. The Provincial Auditor

A similarly independent legislative officer with an oversight jurisdiction over the administrative design of government services is the Provincial Auditor. As noted earlier, the Provincial Auditor in Ontario has been active in bringing independent public scrutiny to bear on the Business Transformation Project which ushered in Ontario's new Service Delivery Model. Typically, however, the auditor's review relates to the expenditure of public funds rather than compliance with public law obligations. And here again, the Auditor has no remedial authority beyond reporting on mismanagement or maladministration to the Legislature.

e. Inquests and inquiries

Another public body which may have a mandate to investigate the government's obligations in relation to welfare eligibility is a Coroner's inquest or public inquiry. While inquests and inquiries are fact-finding bodies, they have extensive powers to compel documentary evidence and oral testimony and may be an effective forum to bring about public accountability. The Coroner's Inquest into the death of Kimberly Rogers, (who died during a heat wave inside her apartment while eight months pregnant and under house arrest for welfare fraud), is a good example. Standing was granted to a coalition of poverty-related advocacy groups who sought to ensure that the Inquest focused on the plight of women in Rogers' shoes, in addition to investigating the causes of her death. The recommendations of the Coroner's Jury were wide-ranging and included calls for more discretion afforded to local welfare officials to provide emergency assistance, eliminating the lifetime welfare ban and reviewing the adequacy of welfare benefits.¹⁷⁵

From the standpoint of public accountability there are a number of problems with inquests and inquiries as well. They cannot be initiated by affected parties. They also result only in non-binding recommendations. Finally, they tend to be retrospective investigations, brought about by individually tragic circumstances, and are unlikely to lead to significant administrative reform.

¹⁷⁵ See "Verdict of Coroner's Jury," online: Disabled Women's Network <http://dawn.thot.net/Kimberly_Rogers/kria118.html>.

f. Judicial intervention

While courts, as noted several times above, do not represent the only means of ensuring public accountability for discretionary justice, they remain an important catalyst for this process, both because of the extraordinary remedial powers of the court and its moral authority, and because of the media attention which court challenges tend to bring.¹⁷⁶ The route to court for disputes over welfare eligibility in Ontario typically begins with an individual decision of ineligibility which is then contested, often with the involvement of legal aid counsel, before the Social Benefit SBT. Only then can an application for judicial review be made to the Divisional Court. For the reasons outlined above, this circuitous process rarely puts questions of bureaucratic disenfranchisement before the court (if for no other reason than people who give up on the application process or are discouraged from entering it have no “decision of ineligibility” to object to). As I have discussed, I believe *Charter* and administrative law doctrines could and should apply more effectively to bureaucratic disenfranchisement. There are, however, other options for judicial intervention in the welfare system.

One such option might include a class action against the Crown alleging misuse of public authority, breach of fiduciary obligation or an assortment of other civil wrongs applicable to public bodies.¹⁷⁷ A class action could seek damages equal to lost or forfeited benefits of a class of applicants or recipients or simply a declaration setting out the obligations of Government in relation to the administrative design of welfare eligibility. The benefits of a class action include fuller coverage of people who are affected but might never complain, and the ability to place scrutiny on

¹⁷⁶ To take just one example, judicial review had a significant impact on the administrative process for determining when two people are “spouses” for the purpose of welfare benefits. The Regulation defining “spouses” under the Act permitted two roommates who shared expenses, or two people just starting out in a relationship to be deemed spouses, and therefore to have their benefits reduced. This Regulation was struck down by the Ontario Court of Appeal in *Falkiner* (*supra* note 114). In the course of its reasons, the Court also indicated that an intrusive questionnaire used by welfare officials intruded on the privacy and undermined the dignity of welfare applicants. While the Court’s order did not extend to the administrative process, when the Regulation was redrafted, a new questionnaire and administrative directive accompanied it, significantly reducing the intrusive questions and intimate nature of the information applicants had to provide.

¹⁷⁷ For discussion of these obligations and the recent rise in class actions, see Lorne Sossin, “Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law” (2003) 66 Sask. L. Rev. 129. In *Authorson v. Canada*, [2003] 2 S.C.R. 40, the Supreme Court recognized the application of a Crown fiduciary obligation in the context of a social benefit, although denied relief to the class of disabled veterans on the grounds of a statutory bar to such relief.

systemic practices affecting a large number of people rather than individual decisions. The downside of such an approach, of course, would be the uphill climb to establish the breach of the Crown's legal obligations. Because this would be a civil action rather than a judicial review of administrative decision-making, the doctrines at issue would not be those of procedural fairness or reasonableness, but rather doctrines intended to impose liability for egregious wrongdoing. Establishing that general administrative practices constitute specific breaches of equitable or civil obligations is a tall order.

Thus, while options such as class actions, inquests, auditor reviews, and complaints to the Ombudsman have potential to be accessible and effective mechanisms to secure greater public accountability, there is no one method that strikes the perfect balance. The modalities of public accountability suggest the need for innovation and creative legal thinking. What is clear, in my view, is the need for a principled and practical legal response to the phenomenon of bureaucratic disenfranchisement. This takes me back to where I began, with the question of law's role in welfare administration. I have suggested that the role of law in the realm of welfare administration is no different than its role in other settings of administrative decision-making, that is, to ensure respect for the rule of law and human dignity through mechanisms that guarantee the fairness and reasonableness of exercises of public authority.

IV. CONCLUSION

The Ontario Government has claimed success in its Business Transformation Project. The number of people receiving welfare in Ontario has been substantially reduced (whether for reasons of fraud prevention, disenfranchisement or economic growth is unclear, just as is the question of where people who "leave" welfare actually go). However, as an American observer notes, "[f]ocusing exclusively on the number of recipients no longer receiving welfare ignores numerous unresolved philosophical, political, social, and legal questions accompanying this sweeping overhaul of the welfare system."¹⁷⁸ I have focused on one such unresolved legal question, involving the reach of public law into the recesses of public administration. I have concluded that it is both possible and necessary to subject this largely uncharted terrain of public authority over vulnerable people to public scrutiny and legal standards.

To summarize, I have argued that the exercise of discretion with respect to administrative design in determining eligibility for social

¹⁷⁸ Christine N. Cimini, "The New Contract: Welfare Reform, Devolution and Due Process" (2002) 61 Md. L. Rev. 246 at 248.

assistance should be subject to public law obligations of fairness and reasonableness, and that these obligations arise from public law concerns that the exercise of public authority conforms to fundamental process values such as protecting human dignity. More broadly, I have contended that concerns over legality are difficult to disentangle from concerns over values when it comes to how the state responds to the needs of vulnerable people, especially those dependent on state assistance for their survival. Bureaucratic disentitlement is not only unfair and unreasonable, it is also unsavoury, invidious, and oppressive. If the rule of law is to amount to more than a set of hollow and formal guarantees, it must extend to service delivery models just as it does to social benefit tribunals. In other words, discretionary justice is not simply a matter of the judgments individual officials make but must also be a question of the structures through which those judgments are mediated. If administrative discretion is mediated through call centres, intake scripts and database fields, then public law obligations must, in my view, follow.